

# ADMINISTRATIVE AND CIVIL LAW DEPARTMENT

## ***BASIC COURSE DESKBOOK***



### **Volume I** **Client Services**

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United States Army

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**ADMINISTRATIVE AND CIVIL LAW DEPARTMENT  
BASIC COURSE DESKBOOK**

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## ADMINISTRATIVE AND CIVIL LAW DEPARTMENT

### GENERAL ADMINISTRATIVE LAW

The *General Administrative Law Deskbook* contains Volume II of the instructional materials for the Administrative and Civil Law Department subjects. Volume I of the materials is in the *Client Services Deskbook*. Both deskbooks contain Outlines of Instruction that include a table of contents, reference list, an outline of the law applicable to the subject being taught, and, in some cases, appendices that may include additional instructional material, extracts from Army regulations, and illustrative practical exercises.

These materials are general guides for note-taking during class and should serve later as your starting reference for research. The *General Administrative Law Deskbook* is divided into five parts. Part I addresses the law of military installations where Judge Advocates generally give legal advice to the command. Part II covers military personnel law where the legal advice usually has a command/soldier interface. Part III addresses those legal topics that affect civilian personnel law. Part IV contains the practical exercises and Part V provides resources you may use to develop general lawyer skills.

### INTRODUCTION TO MILITARY ADMINISTRATIVE LAW

**THE CONCEPT.** Military administrative law is the body of statutes, regulations, and judicial decisions that governs the establishment, functioning, and command of military organizations. Legal questions in military administrative law usually involve interpreting statutes and regulations and rendering advice to commanders and their staff. While the legal advice is not binding, the legal advisor should make clear the statutory, regulatory, or other basis so that the recipient can properly assess the ramifications of a proposed action. The materials in this deskbook may assist you in fulfilling this mission.

**CONSTITUTIONAL AUTHORITY.** The United States Constitution grants fundamental military authority to Congress and the President.<sup>1</sup> All activities of the Army,

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<sup>1</sup> The Constitution provides:

The Congress shall have Power To . . . provide for the common Defense . . . ;  
To declare War, . . . ;  
To raise and support Armies, . . . ; To provide and maintain a Navy;

including regulations, orders, and directives, are founded on this basic authority. Since it is impractical for either Congress or the President to participate in every piece of Army business, the Secretary of Defense, the Secretary of the Army, and subordinate officials generally exercise military authority.

**AUTHORITY OF THE SECRETARY OF THE ARMY.** Because the Constitution vests all military authority in Congress and the President, the Secretary of the Army's authority is derived from them.

Congress. Congress has conferred a great deal of authority directly on the Secretary, partly by statutes prescribing specific responsibilities but primarily by a general provision granting "the authority necessary to conduct all affairs of the Department of the Army."<sup>2</sup>

President. The President is expressly authorized to designate any executive branch official who is appointed by and with the advice and consent of the Senate to perform any functions vested in him<sup>3</sup> unless delegation is affirmatively prohibited.<sup>4</sup> He also has the inherent right to delegate the performance of unrestricted functions and express

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To make Rules for the Government and Regulation of the land and naval Forces;  
To provide for calling forth the Militia . . . ;  
To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States, . . . ;  
and  
To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.  
[Art I, section 8.]

The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; . . . [Art II, section 2.]

<sup>2</sup> 10 U.S.C. § 3013(b).

<sup>3</sup> 3 U.S.C. § 301. This statute requires a formal written authorization published in the Federal Register.

<sup>4</sup> 3 U.S.C. § 302.

authorization is not required when the act would be presumed in law to be done by authority or direction of the President.<sup>5</sup>

The President has delegated many Presidential functions to the Secretary of Defense or the Secretary of the Army by executive order or otherwise. The Secretary performs other presidential functions without express delegation, either on the theory of an implied delegation of authority or under the alter ego doctrine.<sup>6</sup>

The alter ego doctrine does not require a true delegation of authority and, in fact, allows the Secretary to exercise some Presidential functions which are actually nondelegable. The United States Supreme Court established this doctrine understanding that the President cannot act personally in each of his many official duties.<sup>7</sup> Under the alter ego doctrine, the act of the head of an executive department is presumed in law to be the act of the President.<sup>8</sup>

In performing nondelegable Presidential functions, the Secretary specifies that the action is "by direction of the President." In performing delegable functions, the Secretary takes action in his own right.

**DELEGATION.** The Secretary of Defense may in turn delegate authority to the Secretary of the Army;<sup>9</sup> the Secretary of the Army also delegates a great many of his functions to subordinates.

Within the Secretariat. The Secretary is expressly authorized to assign appropriate duties to the Under Secretary and to the Assistant Secretaries of the Army.<sup>10</sup>

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<sup>5</sup> *Id.*

<sup>6</sup> *See Dunmar v. Ailes*, 348 F.2d 51, at 55 (D.C. Cir. 1965).

<sup>7</sup> *See Wilcox v. Jackson*, 38 U.S. (13 Pet.) 498, 513 (1839).

<sup>8</sup> Note that Congress has recognized and avoided limiting the alter ego doctrine. *See* 3 U.S.C. § 302.

<sup>9</sup> *See* 10 U.S.C. § 133(d), 3012.

<sup>10</sup> 10 U.S.C. § 3012(c).

Below the Secretariat. There is no general legislation authorizing the Secretary of the Army to delegate his functions to authorities below the Secretariat, although there are various statutory provisions authorizing delegation in specific instances.<sup>11</sup> Even without statutory authorization, the Secretary may delegate ministerial functions, but not discretionary powers. In discretionary issues, the Secretary may exercise discretion in the form of regulations establishing specific standards. The application of such standards to particular cases is then treated as being ministerial.

### **PROMULGATION OF ARMY REGULATIONS**

**AUTHORITY.** Some statutes contain specific provisions authorizing the issuance of implementing regulations<sup>12</sup> while others contain general authorization:

- The President may prescribe regulations to carry out his functions, powers, and duties under this title.<sup>13</sup> The President may prescribe regulations for the government of the Army.<sup>14</sup>
- The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property.<sup>15</sup>
- The Secretary of the Army may prescribe regulations to carry out his functions, powers, and duties under this title.<sup>16</sup>

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<sup>11</sup> *E.g.*, 10 U.S.C. § 672 (authority to order Reserves to active duty).

<sup>12</sup> *See, e.g.*, 10 U.S.C. § 3362(g) (Reserve promotions).

<sup>13</sup> 10 U.S.C. § 121.

<sup>14</sup> 10 U.S.C. § 3061.

<sup>15</sup> 5 U.S.C. § 301.

<sup>16</sup> 10 U.S.C. § 3013(g)(3).

Army regulations are issued "by order of the Secretary of the Army," over the signature block of the Chief of Staff of the Army, and authenticated by The Adjutant General. The signature of the Secretary of the Army or his designee is not essential.

**LIMITATIONS.** Because the Constitution expressly gives Congress rule-making power over the entire field of military administration but does not define the rule-making powers of the President as Commander in Chief, the executive branch is limited by any congressional action that has been taken. To the extent Congress has made "Rules for the Government and Regulation of the land and naval forces," the President is precluded from acting. To the extent Congress has not occupied the field, the President can act.

Although Congress may not delegate its power to make a law, it may make a law permitting determination of some fact or state of things upon which action under the law may depend. In this way, Congress, provided it has set a sufficiently definite standard, can confer rule-making power upon the President or other administrative officers. This is not a delegation of legislative power, but the conferring of the power to fill in the details of broad legislative standards. Rule-making power need not be expressly conferred, but may be implied as necessary to accomplish the broad legislative purpose.

### COMMAND AUTHORITY

Congress has authorized the Secretary of the Army to assign, detail, and prescribe the duties of members of the Army.<sup>17</sup> Command is exercised by virtue of the office and special assignment of members of the Army holding military rank who are eligible by law to exercise command.<sup>18</sup> Therefore, civilians and officers who are not eligible by statute may not exercise command.<sup>19</sup> The Secretary of the Army has also established other restrictions on eligibility for command: for example, soldiers who are under arrest, at an installation where not permanently

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<sup>17</sup> 10 U.S.C. § 3013(g)(1).

<sup>18</sup> AR 600-20, Army Command Policy, para 1-5.

<sup>19</sup> A chaplain has rank without command. 10 U.S.C. § 3581. An officer in the Medical Department is not generally entitled to exercise command except within the Medical Department. 10 U.S.C. § 750 (1982). Retired officers may not exercise command except when on active duty. 10 U.S.C. § 750.

assigned, or assigned to the General Staff or Department of the Army staff agencies are not eligible for command.<sup>20</sup>

Command is normally connected with seniority in rank. Thus, the senior officer eligible for command is the commander. Rank is the relative position or degree of precedence bestowed on military.<sup>21</sup> The chain of command is the fundamental organizational technique for the exercise of command and is simply the succession of commanders, superior to subordinate. At the head of the chain of command is the President, acting as the Commander in Chief. Staff and administrative officers are not in the chain of command. It is Army policy that each individual in the chain of command is delegated sufficient authority to accomplish his assigned tasks and responsibilities.<sup>22</sup>

The actual scope of command has several sources. Some authority is given commanders by statute,<sup>23</sup> while other command authority is contained in various Army regulations.<sup>24</sup> A commander also has inherent power to issue orders necessary to accomplish the mission or assure the welfare of his troops so long as such orders are lawful.<sup>25</sup> The scope of command authority is also limited to the personnel and the physical facilities which make up a particular command.

With this brief overview of military administrative law, welcome to the Basic Course and the expanding and exciting world of administrative and civil law.

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<sup>20</sup> See AR 600-20, paras 2-15, 2-16.

<sup>21</sup> AR 600-20, para 1-6.

<sup>22</sup> AR 600-20, para 2-1b.

<sup>23</sup> *E.g.*, commanders are authorized by statute to administer nonjudicial punishment to members of their commands. 10 U.S.C. § 815.

<sup>24</sup> *E.g.*, commanders are authorized by regulations to take specific actions relating to the elimination of enlisted members. AR 635-200, Enlisted Personnel.

<sup>25</sup> See *Greer v. Spock*, 424 U.S. 828 (1976); *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, at 892-3 (1961).

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## ***BASIC COURSE DESKBOOK***



### **Part I**

### **Law of Military Installations**

The Judge Advocate General's School  
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**CHAPTER A**  
**LAW OF MILITARY INSTALLATIONS**  
**SOURCES OF COMMAND AUTHORITY**  
**AND**  
**REGULATION OF INSTALLATION ACTIVITIES**

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## **OUTLINE OF INSTRUCTION**

### **I. SOURCES OF COMMAND AUTHORITY**

#### **A. Constitution:**

1. Article 1, Section 8: “Congress shall have the power to ... declare war ... raise and support Armies ... make rules for the Government and regulation of the Land and Naval forces ....”
2. Article II, Section 2: “The President shall be Commander in Chief of the Army and Navy of the United States.”

#### **B. Statutes, e.g., 10 U.S.C. sections 1071-1104, “under regulations to be prescribed by the Secretary of Defense,” active duty military entitled to medical and dental care in any facility of the uniformed services.**

#### **C. Regulations: DoD Directives/Instructions; Army Regulations; local regulations.**

#### **D. Inherent Authority. Recognized in Cafeteria and Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961)(power of a commander over an installation is “necessarily extensive and practically exclusive, forbidding entrance and controlling residence as the public interest may demand”). See also Greer v. Spock, 424 U.S. 828 (1976)(commander has the “historically unquestioned power” summarily to exclude civilians from the area of his command; “There is nothing in the Constitution that disables a military commander from acting to avert what he perceives to be a clear danger to the loyalty, discipline, or morale of troops on the base under his command”).**

- II. **DELEGATION OF COMMAND AUTHORITY:** “Any duties of an installation commander may be delegated except those which are imposed upon installation commander by law, such as those mentioned in the Uniform Code of Military justice, appropriation acts, other statutory provisions and regulations, or other directives that specifically prohibit delegation.” [language from now-rescinded AR 210-10, para 2-5].

### III. **USE OF COMMAND AUTHORITY TO REGULATE:**

A. Speech

1. Nature of Forum:

- a. Public Forum: Traditionally used for free speech activities, such as public streets and sidewalks. See Hague v. Committee for Industrial Organization, 307 U.S. 496 (1939); Capitol Square Review & Advisory Board v. Pinette, 115 S.Ct. 2440 (1995)(state owned plaza surrounding Statehouse in Columbus, Ohio). But see U.S. v. Kokinda, 497 U.S. 720 (1990)(sidewalk used solely as a passage for postal patrons not a public sidewalk).
- b. “Created” Public Forum: aka “limited” or “designated.” Government property set aside for free speech activities. E.g., Lamb’s Chapel v. Center Moriches Union Free School District, 508 U.S. 384 (1993)(school district opened school facilities for use after school hours by community groups for wide variety of social, civic, and recreational purposes); Rosenberger v. Rector and Visitors of the University of Virginia, 115 S.Ct. 2510 (1995)(university’s Student Activities Fund, funded by mandatory student fees, paid for, inter alia, student group publications on student news, information, opinion, entertainment, or academic communications). Intent & extent of use granted is key.
- c. Nonpublic Forum. Public property which is not by tradition or designation a forum for public communication may be reserved for its intended purpose so long as “regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view.” Perry Education Association v. Perry Local Educators’ Association, 460 U.S. 37 (1983) (selective access to school mailboxes did not transform property into public forum). Public access such as at open house is not

sufficient to convert a military installation into a public forum in absence of abandonment of military special interest. Factors include mission-focus and political neutrality. Greer v. Spock, supra; Persons for Free Speech at SAC v. U.S., 675 F.2d 1010 (8<sup>th</sup> Cir. 1982); Brown v. Palmer, 915 F.2d 1435 (10<sup>th</sup> Cir. 1990); Contra, U.S. v. Albertini, 710 F.2d 1410 (9<sup>th</sup> Cir. 1983), rev. on other grounds, 472 U.S. 675 (1985).

2. Content- Based Restriction:

- a. Public Forum: strict scrutiny (necessary to serve a compelling state interest and narrowly drawn to achieve that end).
- b. “Created” Public Forum: same strict scrutiny on viewpoint discrimination; subject matter discrimination is not constitutionally prohibited. Rosenberger, supra (discrimination on subject matter which preserves limited forum purpose is permissible; discrimination because of ideology, opinion, or perspective is impermissible when directed against speech otherwise within limited forum; excluding student publication with religious editorial viewpoint from funding for publication available to other student publications held unconstitutional). Accord Lamb’s Chapel v. Center Moriches Union Free School District, supra (prohibiting after hours access to school property to groups with religious viewpoints).
- c. Nonpublic Forum: reasonable for forum. Jones v. N.C. Prisoners’ Labor Union, 433 U.S. 119 (1977)(ban on inmate solicitation to join prison inmate “labor union” and group meetings rationally related to reasonable objectives of prison administration).

3. Unprotected Speech:



- a. Fighting Words, i.e., those “personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction.” Cohen v. California, 403 U.S. 15, 20 (1971)(simply wearing jacket bearing words “F\*\*\* the Draft” may not be constitutionally made a criminal offense); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)(fighting words are “those which by their very utterance inflict injury or tend to incite an immediate breach of the peace;” upheld conviction for calling another “damned racketeer” and “a damned Fascist”).
  
- b. Pornography. Roth v. U.S., 354 U.S. 476 (1957)(1<sup>st</sup> Amendment does not protect obscenity, i.e., material which deals with sex in a manner appealing to prurient interest).
  
- c. Dangerous Speech
  - (1) Civilian Standard: whether words used under circumstances are such as to create a clear and present danger, Schenck v. U.S., 249 U.S. 47 (1919); clear and present danger means directed to inciting or producing imminent lawless action and likely to do so. Brandenburg v. Ohio, 395 U.S. 444 (1969)(mere abstract teaching of propriety or necessity to resort to force and violence not the same as preparing group for and steeling it to violent action).
  
  - (2) Military Standard: speech which undermines the effectiveness of response to command is constitutionally unprotected. Parker v. Levy, 417 U.S. 733, 758 (1974)(different character of the military community and mission requires different application of 1<sup>st</sup> Amendment protections; “fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it”). Priest v. Secretary of the Navy, 570 F.2d 1013 (D.C. Cir. 1977)(affirmed Vietnam era court-martial conviction of seaman for publishing newsletter for active duty military urging desertion to Canada; 1<sup>st</sup> Amendment test in military is that words “tended to interfere with responsiveness to command or to present a clear danger to military, loyalty, discipline, or morale”).

4. Prior Restraint. DoDD 1325.6, Guidelines for Handling Dissident and Protest Activities Among Members of the Armed Forces, 1 Oct 1996; AR 600-20, Army Command Policy, 30 Mar 88, para 5-9.
  - a. Approval in advance to determine whether publication presents clear danger to loyalty, discipline, or morale of military personnel or if distribution would materially interfere with mission is authorized. Prior approval requirement upheld in Greer v. Spock, supra (unsuccessful challenge to regulation prohibiting distribution of political literature on post); Brown v. Glines, 444 U.S. 348 (1980)(unsuccessful challenge to regulation requiring airmen to obtain prior approval from installation commander prior to distributing literature on installation).
  - b. Limitations: Commander can delay publications; only HQDA can refuse. Cannot pull individual issues of materials distributed through PX or library.
5. Solicitation
  - a. Charitable. AR 600-29, Fund Raising within the Department of The Army, 20 Mar 92.
    - (1) Combined Federal Campaign and Army Emergency Relief only on-duty solicitation authorized. CFC selection process upheld. Cornelius v. NAACP Legal Defense Fund, 473 U.S. 788 (1985).
    - (2) Off-duty local fund raising authorized for MWR activities, on-post private organizations, and other limited fund raising to assist the unfortunate such as veteran organization “poppies” and collection boxes for food or goods.
    - (3) Religious fund raising only in conjunction with religious services. See AR 165-1.
  - b. Commercial. AR 210-7, Commercial Solicitation on Army Installations, 22 Apr 86.

- (1) No right to solicit; must be authorized. Permits in writing and valid for up to one year.
- (2) Door-to-door solicitation prohibited. By appointment only; limited to family quarters or other designated areas.
- (3) Highly regulated to maintain discipline, protect property, and safeguard personnel. List of forbidden practices includes mass solicitation, retirees using IDs to get on post to solicit, and distribution of materials to other than the one being solicited.
- (4) Insurance solicitation even more regulated. Note prohibition on possessing allotment forms.
- (5) Violators can lose solicitation privileges; receive due process through “show cause” hearing

6. Political Activities: AR 600-20; Joint Ethics Regulation, DoD 5500.7-R.

- a. Soldiers: Traditional concept is that soldiers do not engage in partisan political activity. Examples: Voting and expressing personal opinion on candidates and issues authorized; distributing partisan political literature is not. See Appendix B, AR 600-20. Prohibitions include no public demonstrations (partisan and nonpartisan) while on duty, in uniform (Locks v. Laird, 300 F.Supp. 915 (D.Colo. 1969)), or in a foreign country (Culver v. Secretary of the Air Force, 559 F.2d 622 (D.C. Cir 1977)).
- b. Civilians: Hatch Act, 5 U.S.C. Sections 7324-27. No political activity on duty, in office space, while wearing uniform or indicia of government position, or using government vehicle. Political activity means partisan, i.e., representing a party. Less restrictive than AR 600-20 is for soldiers.

7. Recurring Issue: bumper stickers & signs:

- a. Small bumper sticker on private vehicle is authorized; large sign or poster is not.

- b. Bumper stickers disrespectful to President can be banned. Ethredge v. Hail, 56 F.3d 1324 (11<sup>th</sup> Cir. 1995)(order barring civilian from displaying on his truck stickers embarrassing or disparaging to the President not violative of 1<sup>st</sup> Amendment).
- 8. Extremist organizations: DoD Dir. 1325.6, Guidelines for Handling Dissident and Protest Activities Among Members of the Armed Forces. AR 600-20, Command Policy, para. 4-12 (15 July 1999).
  - a. Participation in extremist organizations or activities is incompatible with military service.
  - b. Extremism includes advocating racial, gender or ethnic hatred or intolerance; engaging in illegal discrimination based on race, color, gender, religion, or national origin. .
  - c. Punitive prohibitions include: participating in public demonstrations or rallies; fund raising; recruiting; creating or leading; distributing literature presenting a danger to discipline/mission accomplishment; attending meetings under certain circumstances, e.g., in violation of commander's order.
  - d. Expressly recognizes commander's inherent authority to prohibit activities which will adversely affect good order, discipline, morale within the command.

## B. Religion

- 1. Constitutional test. Lemon v. Kurtzman, 403 U.S. 602 (1977)(three part test: proposed government action must have a secular legislative purpose; have a primary effect that neither advances nor inhibits religion; and not involve excessive government entanglement with religion)
  - a. Applied:

- (1) Religious displays. American Civil Liberties Union v. City of Birmingham, 791 F.2d 1561 (6<sup>th</sup> Cir. 1986)(city nativity scene in front of city hall unconstitutional); Jewish War Veterans v. United States, 695 F.Supp. 3 (D.D.C. 1988)(65-ft cross in front of HQ on military installation unconstitutional).
- (2) Holiday displays. Lynch v. Donnelly, 465 U.S. 668 (1984)(secular holiday display which included nativity scene not unconstitutional).
- (3) Invocations. Lee v. Weisman, 505 U.S. 577 (1992)(“nonsectarian” prayer at middle and high school graduation ceremonies impermissible establishment of religion).
- (4) Day care. Hartmann v. Stone, 68 F.3d 973 (6<sup>th</sup> Cir. 1995)(Army regulations prohibiting Family Child Care providers from having any religious practices during their day-care program unconstitutional; relationship between Army and provider is solely one of regulator and regulatee and does not create an unconstitutional entanglement).

b. Exceptions

- (1) Army Chaplaincy Program constitutional. Katcoff v. Marsh, 755 F.2d 223 (2d Cir. 1985).
- (2) Opening legislative sessions with invocation constitutional. Marsh v. Chambers, 463 U.S. 783 (1983).

2. Statute: 10 U.S.C. section 774, legislatively overruling Goldman v. Weinberger, 475 U.S. 503 (1986)(granting great deference to professional judgment of military authorities on matters of military interest and holding that 1<sup>st</sup> Amendment did not prohibit AF regulation preventing wearing of yarmulke while on duty and in uniform). Statute provides for wearing of neat and conservative items of religious apparel while in uniform unless wear would interfere with performance of duty.

3. Regulation & Policy. DoDD 1300.17, Accommodation of Religious Practices Within the Military Services, Feb 88; AR 600-20, para 5-6; DA Pam 600-75, Accommodating Religious Practices, 22 Sep 93.
  - a. Policy is to approve requests for accommodation of religious practices when it will not have an adverse impact on readiness, safety, discipline, etc.
  - b. Commander responsibility; HQDA board (Committee for Review of Accommodation of Religious Practices in U.S. Army).
  - c. DA Pam 600-75 states that “Religious practices are not limited to mandatory tenet of a religious faith group. Individual conscience and personal piety may warrant the same degree of consideration as the tenets of a recognized religious group.”
  - d. Specific practices:
    - (1) Worship: worship requirements that conflict with normal availability for duty will be accommodated unless precluded by military necessity.
    - (2) Dietary: exception to policy to ration separately and take personal supplemental rations in field/combat environment.
    - (3) Medical practices: no accommodation in lifethreatening situations; otherwise, medical board will consider request.
    - (4) Wear and appearance: neat and conservative items of religious apparel may be worn except if it would interfere with performance of duty.

#### **IV. AUTHORITY OFF THE INSTALLATION: THE ARMED FORCES DISCIPLINARY CONTROL BOARD (AFDCB). AR 190-24.**

- A. Mission: to make recommendations on eliminating conditions which affect health, safety, morals, welfare, morale, or discipline.

- B. Duties: include taking action on reports of negative conditions, liaison with civil authorities, recommendations to commander.
- C. Composition: representatives include law enforcement, legal, health and environment, equal opportunity, and safety.
- D. Sanction: may recommend off-limits area, i.e., any vehicle, conveyance, place, structure, building, or area prohibited to military personnel to use, ride, visit, or enter during the off-limits period.
- E. Due process provided in form of notice and opportunity to be heard at board.
- F. Loss to business from order is not a “taking” for which damages accrue. Ainsworth v. Barn Ballroom Co., 157 F.2d 97 (4<sup>th</sup> Cir. 1946).
- G. Enforcement: Violation of off-limits is UCMJ offense.

## **V. CONCLUSION**





**CHAPTER B**  
**LAW OF MILITARY INSTALLATIONS**  
**FEDERAL-STATE RELATIONS ON AND OFF MILITARY INSTALLATIONS AND**  
**FEDERAL AUTHORITY OVER LAND**

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## **Outline of Instruction**

### **I. EXERCISING FEDERAL AUTHORITY INCIDENT TO LEGISLATIVE JURISDICTION.**

#### **A. Definition. Art. I, § 8, cl. 17.**

The Congress shall have power . . . to exercise exclusive Legislation in all cases whatsoever, over such District . . . as may, by Cession of particular States, and the Acceptance of Congress, become the seat of the Government . . . and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the same shall be, for the Erection of Forts, Magazines, Arsenals, Dockyards, and other needful Buildings . . . .

#### **B. Concept of Legislative Jurisdiction.**

- a. The concept is liberally construed with experience.
  - b. “[P]urchased” means obtained.
  - c. “[P]laces” means any property occupied by the federal government.
- 2. Exclusive legislative jurisdiction: displaces state jurisdiction. The government has received all the authority of the state to legislate with no reservation by the state. These areas are often referred to as “enclaves.”
  - 3. Concurrent jurisdiction: both state and federal governments may exercise full legislative jurisdiction.
  - 4. Partial jurisdiction: the state has reserved some but not all legislative jurisdiction. Examples:

- a. State reserves power to tax but cedes all other powers.
- b. State cedes only criminal jurisdiction, reserving all other powers.

Example: Virginia has reserved the power to exclusively license and regulate, or to prohibit, the sale of intoxicating liquors on any lands the United States acquires.

Example: A Minnesota statute states, “the jurisdiction of the United States over any land or other property within this state now owned or hereafter acquired for national purposes is concurrent with and subject to the jurisdiction and right of the state . . . to punish offenses against its laws committed therein.”

- 5. Proprietary interest - United States only occupies the property. TJAGSA, leased government housing.

C. Acquisition of Legislative Jurisdiction.

- 1. Purchase and consent.
- 2. Cession.
- 3. Reservation.

D. Policy to Acquire Only Proprietorial Interest in Land and Not Any Degree of Legislative Jurisdiction Except Under Exceptional Circumstances. Army Reg. 405-20, Federal Legislative Jurisdiction (1 Aug. 1973).

- 1. Acceptance of legislative jurisdiction by the United States.
- 2. Acceptance of jurisdiction presumed as to all lands over which jurisdiction was ceded before 1940. *Silas Mason Co. v. Tax Commission*, 302 U.S. 186 (1937); *Fort Leavenworth Railroad v. Lowe*, 114 U.S. 525 (1885).

3. Affirmative acceptance of jurisdiction required for cessions of jurisdiction **after 1940**. 40 U.S.C. § 255.

[T]he head or other authorized officer of any department . . . may . . . accept or secure from the State . . . consent to or cession of such jurisdiction, exclusive or partial . . . and indicate acceptance . . . by filing a notice . . . with the Governor . . . or in such other manner as may be prescribed by the laws of the State. . . .

4. Look to the date when jurisdiction offered to determine which rule applies. *Adams v. United States*, 319 U.S. 312 (1943); *United States ex rel. Greer v. Pate*, 393 F.2d 44 (7<sup>th</sup> Cir.), cert. denied, 393 U.S. 890 (1968); *Markham v. United States*, 215 F.2d 56 (4<sup>th</sup> Cir. 1954), cert. denied, 348 U.S. 939 (1955). Examples:

- a. Land purchased **before 1940** with **consent of the state legislature**: jurisdiction flowed to U.S. at time of sale; acceptance presumed.
- b. Land purchased **before 1940** and state **cedes jurisdiction before 1940**: acceptance presumed.
- c. Land purchased **after 1940** with **consent of the state legislature**: jurisdiction can transfer at time of sale, but U.S. must affirmatively accept.
- d. Land purchased **before 1940** and state **cedes jurisdiction after 1940**: U.S. must affirmatively accept.

5. State may place procedural conditions on federal acquisition of jurisdiction.

E. State Reservations of Authority.

F. Disposal of Legislative Jurisdiction.

1. Reverter clause in original consent or cession may operate. *Palmer v. Barrett*, 162 U.S. 399 (1896). But see, *Arlington Hotel v. Fant*, 278 U.S. 439 (1929).
2. Government may abandon federal interest in land or may cease to use it for federal purposes.
3. Dispose of jurisdiction in the same way it was accepted—secretarial notification or compliance with state law. 10 U.S.C. § 2683 (1982).
4. Can states resist retrocession?

## II. SOURCES OF CIVIL LAW ON EXCLUSIVE JURISDICTION INSTALLATIONS.

A. No Congressional Action - or - Mooove That Train.

1. State law existing at the time exclusive legislative jurisdiction was obtained remains effective.
  - a. Laws intended for protection of private rights continue when sovereigns change. *Chicago, Rock Island & Pacific Ry. v. McGlinn*, 114 U.S. 542 (1885).
  - b. Rule taken from international law.
  - c. Subsequently enacted state laws do not apply. *Arlington Hotel v. Fant*, 278 U.S. 439 (1929).

- d. State law which survives becomes federal law. *Stokes v. Adair*, 265 F.2d 662 (4<sup>th</sup> Cir. 1959).
  - 2. Displacing or altering law acquired under McGlinn.
    - a. Contrary federal law or policy displaces federal law obtained from state law. *Lord v. Local Union No. 2088*, 646 F.2d 1057 (5<sup>th</sup> Cir. 1981), cert. denied, 458 U.S. 1106 (1982).
    - b. “Direct action of the new government” includes action of the Executive as well as of the Congress. *Anderson v. Chicago and Northwestern R.R.*, 102 Neb. 578, 168 N.W. 196 (1918).
  - 3. Problems applying the McGlinn Doctrine.
    - a. Finding old law is difficult.
    - b. New developments in the law may be preferable to older, now generally, obsolescent laws. Example: *Murray v. Joe Gerrick Co.*, 291 U.S. 315 (1934).
    - c. Different rules of law may apply to different parts of the same installation where acquired at different times. *Board of Supervisors of Fairfax County v. United States*, 408 F. Supp. 556 (E.D. Va. 1976).
- B. Congressional Action to Adopt or Extend State Civil Laws.
- 1. Current wrongful death and personal injury state laws apply as federal law. 16 U.S.C. § 457. *Murray v. Joe Gerrick Co.*, 291 U.S. 315 (1934); *Vasina v. Grumman Corp.*, 644 F.2d 112 (2d Cir. 1981); *Quadrini v. Sikorsky Aircraft Division*, 425 F. Supp. 81 (D. Conn. 1977), modified in, 505 F. Supp. 1049 (D. Conn. 1981).

2. State fish and game laws. 16 U.S.C. § 670a; 10 U.S.C. § 2671; AR 200-3, Natural Resources - Land, Forest, and Wildlife Management (28 Feb 95.)
3. State worker's compensation laws apply directly: contractors must pay worker's compensation contributions. 40 U.S.C. § 290.
4. State unemployment compensation laws apply directly: employers must comply and state can enforce on the installation. 26 U.S.C. § 3305.
5. State quarantine and health laws. 42 U.S.C. § 97.
6. State and local taxes.
  - a. Sales, use, and income taxes levied on persons and nonfederal entities on the installation. 4 U.S.C. §§ 105-107 (Buck Act).
    - (1) Soldiers' and Sailors' Civil Relief Act may shield members of the Armed Forces from taxes allowed by Buck Act.
    - (2) Does not authorize taxation of the United States or its instrumentalities.
    - (3) Label the state puts on the tax is not necessarily determinative. *United States v. City and County of Denver*, 573 F. Supp. 686 (D. Colo. 1983).
  - b. Gasoline taxes on sales of motor vehicle fuel to private persons. 4 U.S.C. § 104 (Hayden-Cartwright Act).
  - c. Private leasehold interests on federal property. 10 U.S.C. § 2667e.



- d. Where the legal incidence of a tax falls on the United States, the Supremacy Clause preempts. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). Distinguish “legal” incidence from “economic” incidence. *United States v. Michigan*, 851 F.2d 803 (6<sup>th</sup> Cir. 1988); *United States v. Montgomery County, Maryland*, 761 F.2d 998 (4<sup>th</sup> Cir. 1985).

### **III. OPERATION OF THE SUPREMACY CLAUSE TO PREEMPT STATE LAW. U.S. CONST. ART. VI, CL. 2. [NOTE THAT THIS IS AN INDEPENDENT BASIS - SEPARATE FROM ART. I, § 8, CL. 17 - TO APPLY FEDERAL LAW INSTEAD OF THE STATE LAW.]**

The Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

#### **A. Federal Statutes Preempt State Statutes.**

1. Occupation of the field: is compliance with both federal and state law impossible, is national uniformity required, or is the federal scheme pervasive? *Silkwood v. Kerr-McGee*, 464 U.S. 238 (1984).
2. Conflict preemption: does state law present an obstacle to accomplishing and executing the purposes and objectives of Congress? *Kleppe v. New Mexico*, 426 U.S. 529 (1976).

#### **B. Federal Regulations Preempt State Law. *City of New York v. F.C.C.*, 108 S. Ct. 1637 (1988); *Fidelity Federal Savings and Loan Association v. De La Cuesta*, 458 U.S. 141 (1982).**

1. Express congressional authorization not necessary.
2. Agency does not have to choose option which does not conflict with state.

If [an agency's] choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned. *United States v. Shimmer*, 367 U.S. 374, 383 (1961).

- C. Federal Policies Preempt State and Local Law. *United States v. City of Philadelphia*, 798 F.2d 81 (3d Cir. 1986).
- D. State Cannot Interfere With the Federal Function. *Fort Leavenworth Railroad v. Lowe*, 114 U.S. 525 (1885); DAJA-AL 1983/1782 (17 May 1983); DAJA-AL 1982/3084 (7 December 1982).

The United States . . . retained . . . only the rights of an ordinary proprietor; except as an instrument for the execution of the powers of the General Government, that part . . . actually used for a fort or military post was beyond such control of the State, by taxation or otherwise, as would defeat its use for those purposes. *Fort Leavenworth v. Lowe*, 114 U.S. at 527.

- 1. Activities of federal installations are shielded by the Supremacy Clause from direct state regulation unless Congress provides “clear and unambiguous” authorization for the regulation. *Goodyear Atomic Corp. v. Miller*, 108 S.Ct. 1704, 1709 (1988).
- 2. Supremacy principle extends to local government regulation of installation and requires detailed analysis of specific federal statute. Compare *United States v. Town of Windsor*, 765 F.2d 16 (2d Cir. 1985) (invalidating local building permit ordinances applied to federal contractors) with *Parola v. Weinberger*, 848 F.2d 956 (9<sup>th</sup> Cir. 1988) (Resource Conservation and Recovery Act required federal installations to comply with local ordinance governing garbage collection).

#### **IV. EXERCISE OF STATE AUTHORITY ON EXCLUSIVE JURISDICTION INSTALLATIONS.**

- A. Keeping the State Out—Traditional View: Enclave is a Federal Island—A State Within a State.

1. Liquor shipped to an exclusive federal enclave is never “within” the surrounding state. *Collins v. Yosemite Park Co.*, 304 U.S. 518 (1938).
  2. Enclave residents are not residents of the surrounding state.
- B. Allowing the State In -- Alternate View: Where There is No Interference With the Federal Interest, the Fiction of a State Within a State Will Be Ignored.
1. The basic rule—where there is no friction, avoid the fiction. *Howard v. Commissioners of Louisville*, 344 U.S. 624 (1953)
  2. The exception—it is the potential for friction rather than the existence of friction that controls. *United States v. McGee*, 714 F.2d 607 (6<sup>th</sup> Cir. 1983).

The Court does not doubt that the City . . . would willingly agree at this time to noninterference with the function of the . . . base. But what one board of city commissioners can agree to, another board of city commissioners can reverse. It is this aspect of annexation that is most troubling.

C. Areas of Conflict—

1. Taxing and Regulating Alcohol.
  - a. Courts continue to adhere to the “state within a state” view. *United States v. Texas*, 695 F.2d 136 (5<sup>th</sup> Cir.), cert. denied, 464 U.S. 933 (1983); *United States v. South Carolina*, 578 F. Supp. 549 (D.S.C. 1983).

- b. Malt beverages and wine must be purchased from in-state distributors; liquor generally must be purchased from most competitive source, wherever located. 10 U.S.C. § 2488(a); See also AR 215-1, Nonappropriated Fund Instrumentalities and Morale, Welfare, and Recreation Activities, para 7-12 (29 Sep 1995).
  - c. U.S. Supreme Court decision upholds state's authority to impose labeling and reporting requirements on out-of-state liquor wholesalers who do business with United States. *North Dakota v. United States*, 110 S.Ct. 1986 (1990).
- 2. Voting Rights. *Evans v. Cornman*, 398 U.S. 419 (1970).
- 3. Annexation. *United States v. McGee*, 714 F.2d 607 (6<sup>th</sup> Cir. 1983); *United States v. City of Leavenworth*, 443 F. Supp. 274 (D. Kan. 1977); AR 405-25, Annexation. GENERAL RULE: Do not oppose annexation unless it would not be in the federal government's best interest, or it is opposed by another local jurisdiction—DOD Dir. 4165.6, Real Property Acquisition, Management, and Disposal, para. F.2.g. (Sep. 1, 1992); AR 405-25, Annexation (25 Sep. 1973).
- 4. Education. Impact Aid Controversy. (Laws rewritten in 1996-97) *United States v. Onslow County Bd. of Educ.*, 728 F.2d 628 (4<sup>th</sup> Cir. 1984).
  - a. Financial assistance to Local Educational Agencies.
    - (1) Per capita aid. 20 U.S.C. §§ 7701-7714, as amended by Pub. L. No. 105-18, §§ 60004-60007, 111 Stat. 158 (1997).
    - (2) School construction in areas affected by federal activities. 20 U.S.C. §§ 7708-09
  - b. *United States v. Onslow County Board of Education*, 728 F.2d 628 (4<sup>th</sup> Cir. 1984).

- (1) Application for and receipt of payments created a contractual obligation.
- (2) Tuition charge obviously takes the place of state revenues to support education; because it is a tax, the Soldiers' and Sailors' Civil Relief Act, 50 U.S.C. app. § 581, preempts the tuition charge.
- (3) The tuition charge is unlawful because it burdens the relationship with the federal government.

5. Spouse and Child Welfare Services.

- a. Problems raised by exclusive jurisdiction. In Re Terry Y., 161 Cal. Rptr. 452, 101 Cal. App. 3d 178 (Ct. App. 1980); State in Interest of D.B.S., 349 A.2d 105 (N.J. Super. Ct. 1975).
- b. Domestic Relations Restraining Orders. Applying Howard and Cornman, the Supreme Judicial Court of Massachusetts upheld a lower court's authority to issue a restraining order enforceable on Fort Devens, an exclusive federal jurisdiction. The court concluded that the order did not interfere with the federal function and was, therefore, lawfully effective. Cobb v. Cobb, 406 Mass. 21, 545 N.E.2d 1161 (1989).
- c. Current Policy. Invite state authorities onto the installation. DOD Dir. 6400.1, Family Advocacy Program (June 23, 1992); AR 608-18, paras 2-10, 2-11, The Army Family Advocacy Program (1 Sep 1995) (Note: App. D also defines legislative jurisdiction.); SECNAVINST 1752.3, DON Policy—Family Advocacy Program; MCO 1752.3A, MC Family Advocacy Program. Memorandums of Understanding with local agencies. DAJA-AL 1983/1468 (28 January 1983). AR 608-18, The Army Family Advocacy Program (1 Sep. 1995), App. C.

## **V. FEDERAL-STATE RELATIONS OFF THE INSTALLATION— MILITARY SUPPORT TO LOCAL COMMUNITIES.**

A. Service of State Civil Process. AR 27-40, Litigation, para. 2-3 (19 Sep 1994).

1. Service of process on concurrent jurisdiction, proprietary interest installations, and exclusive federal jurisdictions where the state has the right to serve process.
  - a. Commanders will inform persons to be served who may decline to voluntarily accept process.
  - b. When service is declined, state law for service will be followed.
    - (1) Service on the installation is subject to reasonable limitations.
    - (2) Service includes levy on personal property.
2. Service of process on exclusive jurisdiction installations where there has been no reservation of right to serve process.
  - a. Commanders will inform persons to be served who may decline to voluntarily accept process.
  - b. If the person to be served declines service, process server should be advised that federal legislative jurisdiction precludes service of process.

B. Service by Members of the Armed Forces on State and Local Juries.

1. Permitted where it does not interfere with their military duties. 10 U.S.C. § 982; DOD Dir. 5525.8; Army Reg. 27-40, Litigation, ch. 10 (19 Sep 1994).
  2. Exemptions: general officers, commanders, soldiers stationed OCONUS and in certain other U.S. possessions, trainees, and soldiers assigned to “forces engaged in operations.” SPCMCA must approve.
  3. Exemption for others if SPCMCA determines that jury duty:
    - a. unreasonably interferes with performance of the soldier’s military duties, OR
    - b. adversely affects readiness of the soldier’s unit.
- C. Disaster Relief (AR 500-60).
1. Provide where directed by higher authority, or
  2. When a serious emergency requires an immediate response to save life or lessen major property damage.
- D. Other Emergency Programs.
1. Military Assistance to Safety and Traffic (MAST) (AR 500-4).
  2. Fire Protection Assistance (AR 420-90).
  3. Search and Rescue Operations (SAR) (AR 500-2).

E. **Innovative Readiness Training (IRT)** - 10 U.S.C. § 2012; DoD Dir. 1100.20, Support and Services for Eligible Organizations and Activities Outside the Department of Defense (Jan. 30, 1997)

1. Formerly known as the Army's Domestic Action Program under AR 28-19 (now rescinded).
2. Defines IRT as off-post military training, conducted in U.S., its territories or possessions, and Puerto Rico, which assists civilian efforts to address civic and community needs.
3. Requirements:
  - a. Must fulfill valid training (MOS) requirements.
  - b. Must avoid competition with commercial sources.
  - c. Examples include: constructing rural roads and runways; transporting medical supplies in underserved areas; providing medical/dental services to underserved areas.

F. Community Relations Program (AR 360-61).

1. Provide support to activities that will . . .
  - a. Increase public awareness of Army missions.
  - b. Inspire patriotism.
  - c. Foster good relations.
  - d. Support recruiting.



2. Concerns.
  - a. No selective benefit.
  - b. No demeaning work for soldiers.
  - c. Noncompetition.
  - d. Participation should be incidental, except for patriotic programs or celebrations of national holidays.

## **VI. EXERCISING FEDERAL AUTHORITY THROUGH THE PROPERTY CLAUSE.**

- A. Definitions. Art. IV, § 3, cl. 2.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States. . . .

- B. The Property Clause is broadly construed and affects not only the land itself but also activities on the land. *Kleppe v. New Mexico*, 426 U.S. 529 (1976).

1. The Property Clause power is independent from exercise of legislative jurisdiction.
2. The Property Clause power is “complete.”

- C. The Property Clause power allows regulation of activities on adjoining lands.

1. *United States v. Alford*, 274 U.S. 264 (1927). (Congress may prohibit and criminalize building fires on private land near publicly-owned forests.)

2. Camfield v. United States, 167 U.S. 518 (1897). (Congress may prohibit erection of fences on private land where effect is to impede access to public lands.)
3. United States v. Arbo, 691 F.2d 862 (9<sup>th</sup> Cir. 1982). (Federal officials may properly conduct compliance inspections of private mining claims on state land adjacent to federal property.)
4. United States v. Brown, 552 F.2d 817 (8<sup>th</sup> Cir.), cert. denied, 413 U.S. 949 (1977). (Federal government may regulate hunting on non-federal waters in order to protect wildlife and visitors on adjacent federal lands.)
5. United States v. Moore, 640 F. Supp. 164 (S.D. W. Va. 1986) (Federal officials may prevent state from spraying for insects on state land adjacent to federal park.)

## **VII. CONCLUSION.**



**CHAPTER C**  
**LAW OF MILITARY INSTALLATIONS**  
**GENERAL LOMI ISSUES**

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Outline to be distributed in class.

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# **CHAPTER D**

## **LAW OF MILITARY INSTALLATIONS**

### **INTRODUCTION TO ENVIRONMENTAL LAW**

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<b>VI. CONCLUSION .....</b>	<b>10</b>

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## **OUTLINE OF INSTRUCTION**

***"The Army will be a national leader in environmental and natural resource stewardship for present and future generations as an integral part of our mission."***

**-Vision**

### **I. INTRODUCTION.**

A. Goals of class

B. Test Information

### **II. REFERENCES: (SEE JA 234, ENVIRONMENTAL LAW DESKBOOK: ON CD-ROM)**

### **III. DEVELOPMENT OF ENVIRONMENTAL LAW.**

A. Mankind and the Environment.

1. Conquer nature.

2. Exploit resources.

3. Solution to pollution.

B. Industrial Activities Control vs. Natural Resources

1. Command & Control vs. Protection & Management
2. Enforcement vs. Collaboration

C. The U.S. Solution.

1. Media specific regulation; i.e., air, water, etc.
2. Scientific.
3. Regulatory.
4. Balance economy with environment.
5. Federal/state relations.

D. Procedures.

1. Statute.
2. Rule making.
3. Public participation.
4. Citizen suits.

#### **IV. DEVELOPMENT OF ARMY ENVIRONMENTAL LAW.**

A. Early Years.

B. Rocky Mountain Arsenal.



C. Chemical Weapons Demilitarization Efforts.

1. Program Manager for Chemical Demilitarization (early 1970s).
2. Installation Restoration Program.

D. Environmental Litigation.

1. Rocky Mountain Arsenal.
2. Twin Cities Army Ammunition Plant.
3. Aberdeen Prosecutions.

**V. ENVIRONMENTAL LAW AND FEDERAL FACILITIES.**

A. Basic Principles.

1. Increasing state authority over federal activities.
2. Sovereign immunity has largely been eliminated. The goal is to have federal facilities treated like any other part of the regulated community **(see the tables at the end of this outline for statute specific information.)**
3. Traditional legal defenses are generally not available; strict liability is the guiding principle.
4. No automatic National Defense exemptions. Exemptions are available, but they usually require a Presidential or Secretary of Defense finding of necessity.

B. Environmental Trends.

1. Cleaning the environment at any cost versus as clean an environment as we can get for a reasonable cost.
2. Increasing enforcement actions targeting individuals rather than corporations.
3. Increasing federal facility compliance.

C. Compliance with U.S. Environmental Laws Overseas.

1. With the exception of NEPA's application to Antarctica, there is no direct application of U.S. laws to overseas operations. DOD has, however, decided to apply many U.S. standards via **DoD Instruction 4715.5**, Management of Environmental Compliance at Overseas Installations, 22 Apr 96 (replaces DoD Directive 6050.16, DoD Policy for Establishing and Implementing Environmental Standards at Overseas Installations, 20 Sep 91).
  - a. Applies to all DOD components including the Unified Combatant Commands.
  - b. Explicitly does not apply to:
    - (1) The operations of U.S. military vessels or aircraft;
    - (2) Off-installation operational and training deployments; or
    - (3) The investigation or execution of remedial or cleanup actions necessary to correct environmental problems arising from past DOD activities.

2. DOD establishes an overseas “baseline” document. The baseline will consist of standards applicable to similar operations conducted in the U.S.
  - a. Once developed, the baseline will be compared with existing host nation law to develop country-specific environmental standards (i.e., Final Governing Standards (FGS)).
  - b. After consultation with the U.S. Diplomatic Mission in the host country, the “Executive Agent” will determine whether to apply baseline standards or host nation standards. Ordinarily, the Executive Agent uses the most protective standard to establish the FGS.
3. Waivers from applicable standards can be obtained from the Executive Agent where “compliance with the standards at particular installations or facilities would seriously impair their actions, adversely affect relations with the host nation or would require substantial expenditure of funds for physical improvements at an installation that has been identified for closure or . . . realignment . . .” Consultation with the Diplomatic Mission must occur before compliance with a host nation standard is waived.

D. Impacts of Noncompliance.

1. Administrative orders
  - a. Massachusetts Military Reservation (MMR) example: 4AOs (first three under the Safe Drinking Water Act (SDWA), fourth issued under RCRA)
  - b. Volunteer Army Ammunition Plant (VAAP): Order issued under RCRA § 3008(h) on 19 January 2001.
2. Citizen suits.
  - a. Most environmental statutes contain citizen suit provisions that permit individuals or groups to enforce them by suing the United States and other parties as private attorney generals.

- (1) Generally, plaintiffs must give prospective defendants 60 days notice prior to filing suit.
  - (2) Successful citizen suits may recover litigation costs and expert witness/attorney fees awards.
  - (3) Citizen suit plaintiff must demonstrate standing, but requirements are relatively minimal.
- b. Citizen suit provisions are found in the following major environmental statutes:
- (1) **ESA**, § 11, 16 U.S.C. § 1540(g);
  - (2) **CERCLA**, § 310, 42 U.S.C. § 9659;
  - (3) **RCRA**, § 7002, 42 U.S.C. § 6972;
  - (4) **CAA**, § 304, 42 U.S.C. § 7604;
  - (5) **CWA**, § 505, 33 U.S.C. § 1365; and
  - (6) **NEPA**. NEPA itself does not provide for citizen suits; however, citizen suits for violations of NEPA may be made pursuant to the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A). Reviewing courts will hold unlawful agency actions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. See Oregon Natural Resources Council v. Marsh, 490 U.S. 332 (1989).

### 3. Monetary costs - restoration.

- a. Cleanup costs are expensive— Approximately \$1.3 billion budgeted for DOD during FY01, of which the Army received approximately \$390 million for the remediation active sites and \$231.5 million for formerly used defense sites (FUDS).

- b. GAO estimated (August 1996) is that it will cost nearly \$11 billion to clean up environmental contamination at BRAC sites alone. In FY (01) Congress appropriated \$281 million to the Army to deal with BRAC environmental restoration requirements.

4. Monetary costs - fines and penalties.

- a. The command may be required to pay fines and penalties to state agencies or EPA.

- (1) Passage of the Federal Facilities Compliance Act (FFCA), Public Law 102-386, dramatically increased the number of fines and penalties paid to the states. Note, the FFCA only waived the sovereign immunity provisions of RCRA.

- (2) Fines and penalties generally must be paid with OMA funds.

- b. EPA penalty guidelines.

- (1) Gravity-based component:

- (a) Extent of deviation from the regulatory requirement; and

- (b) Potential for harm to human health or the environment or to the regulatory process. PLUS

- (2) Multi-day component. PLUS or MINUS

- (3) Adjustment factors.

- (4) Business penalties--*hot issue* (Ft. Wainwright case)

- (a) EPA is starting to apply them to the Army.

(b) The Army & DOD do not believe this is appropriate.

(c) Congress is developing an interest.

5. Personal liability.

a. The Department of Justice (DOJ) is actively pursuing enforcement of environmental laws through criminal prosecution. Focus has shifted from corporate to individual liability.

b. Basis for supervisory responsibility.

(1) Knowledge of the violation.

(a) Actual knowledge, or

(b) “Constructive knowledge”: should have known but failed or refused to find out. PLUS

(2) Authority and responsibility to take corrective action.

c. Issues.

(1) Who represents the federal official?

(a) Federal prosecution: the official must provide his or her own legal defense at his or her own expense.

(b) State prosecution: representation by DOJ is possible, depending on the facts of the case.

(2) Is there any attorney-client privilege between the SJA and the federal official on environmental matters? (Note, however, that the initial communication between a service member and a legal assistance or trial defense service attorney is privileged; but further representation is not available).

(a) As to federal prosecutions: NO!

(b) As to state prosecutions: maybe.

(3) Is there any official immunity?

(a) Federal prosecution: no.

(b) State prosecution: maybe, if:

(i) Acting in good faith compliance with federal law; and

(ii) State law unduly interferes with federal function.

6. Public relations.

a. People care about pollution.

b. An opportunity, as well as a challenge. Good compliance and public relations programs can enhance the command's image and may also positively influence regulators.

c. Failure to gain public confidence may result in denial of access to needed resources.







**CHAPTER E**  
**MILITARY PERSONNEL LAW**  
**THE FREEDOM OF INFORMATION ACT**

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## OUTLINE OF INSTRUCTION

### I. REFERENCES.

#### A. Primary Sources:

1. Freedom of Information Act, 5 U.S.C. § 552, as amended.
2. Department of Defense Directive No. 5400.7, DOD Freedom of Information Act Program (29 September 1997).
3. Department of Defense Regulation No. 5400.7-R, DOD Freedom of Information Act Program (4 September 1998) (includes 1996 amendments to the Freedom of Information Act).
4. Army Regulation No. 25-55, The Department of the Army Freedom of Information Act Program (14 April 1997) (does not include 1996 amendments to the Freedom of Information Act).

#### B. Secondary Sources:

1. Freedom of Information Act Guide & Privacy Act Overview (May 2000), a biennial Department of Justice publication (available on the World Wide Web at <http://www.usdoj.gov/foia> ) [hereinafter DOJ FOIA Guide].
2. American Civil Liberties Union Foundation, Litigation Under the Federal Freedom of Information Act and Privacy Act (20th ed. 1997), Washington, D.C. 20002.
3. Freedom of Information Case List (September 1998), a biennial Department of Justice publication.
4. FOIA UPDATE, the DoJ 's Office of Information and Privacy's (OIP) quarterly newsletter.
5. Web Site Resources:

- a. Department of Justice, Office of Information and Privacy:  
<http://www.usdoj.gov/oip>
- b. Department of Defense Privacy Office:  
<http://www.defenselink.mil/pubs/foi/>
- c. Army: [www.rmd.belvoir.army.mil/foiamain.htm](http://www.rmd.belvoir.army.mil/foiamain.htm)

## **II. INTRODUCTION.**

- A. History.
- B. Key Concepts.
  - 1. Disclosure is the rule, not the exception.
  - 2. The status and purpose of a requester are irrelevant.
  - 3. The government has the burden to justify withholding of information.
  - 4. The requester may seek administrative and judicial relief if access to government information is improperly denied.

## **III. RELEASE OF AGENCY RECORDS.**

- A. Publication. § 552(a)(1) (Requires disclosure of agency procedures, substantive rules, functions, organization and general policy through Federal Register publication).
  - 1. How to obtain information from agency: DOD Reg. 5400.7-R, AR 25-55.
  - 2. Rules of procedure and how to make submissions to agency: Federal Acquisition Regulation (FAR), DOD FAR Supp., and Army FAR Supp. (AFARS).

3. Substantive rules of general applicability. NI Industries v. United States, 841 F.2d 1104 (Fed. Cir. 1988); Vigil v. Andrus, 667 F.2d 931 (10th Cir. 1982); United States v. Mowat, 582 F.2d 1194 (9th Cir. 1978); Pruner v. Department of the Army, 755 F. Supp. 362 (D. Kan. 1991)
- B. “Reading Room” Materials. § 552(a)(2) (Requires agency to make “available for public inspection and copying” records of final opinions, agency orders, and frequently requested material.).
1. Final opinions rendered in the adjudication of cases, specific policy statements, and certain administrative staff manuals. Vietnam Veterans of America v. Department of the Navy, 876 F.2d 164 (D.C. 1989).
  2. Copies of disclosed records, frequently requested under FOIA. Stanley v. Department of Defense, et al., No. 98-CV-4116 (S.D. Ill. June 22, 1999) (military hospital operational manuals are "internal housekeeping rules" as opposed to the kind of material of interest to the general public.)
  3. Reading Room records created after 1 November 1996 must be available on an agency's web site.
  4. The agency does not need to make available materials “related solely to the [agency’s] internal personnel rules and practices.” Hamlet v. United States, 63 F.3d 1097 Fed. Cir. 1995), see, DOJ FOIA Guide.
  5. Index for Public Inspection.
- C. Release Upon Request. § 552(a)(3).
1. Applies to “agency records.” Congress is not an agency for purpose of FOIA. Dow Jones & Co., Inc. v. Department of Justice, 917 F.2d 571 (D.C. Cir. 1990).
    - a. What is a “record?” - “Readily Retrievable and Reproducible.” Examples include: Paper records, photographs, maps and e-mail messages.” DOD Reg. 5400.7-R, para C1.4.3.1; AR 25-55, para 1-402(a) (“machine readable materials ... regardless of physical form”).

- b. What is not a “record?” Physical Objects (e.g. structures), Personal Records. DOD Reg. 5400.7-R, para C1.4.3.2; AR 25-55, para 1-402(b).
  
- c. What is an “agency?” § 552(f). An Agency is a Department of the Executive Branch. Does not include: Congress, Judiciary, Office of the President (including Advisors). Dow Jones & Co., Inc. v. Department of Justice, 917 F.2d 571 (D.C. Cir. 1990) (Congress is not an agency for FOIA); Armstrong v. Executive Office of the President, 90 F.3d 553 (D.C. Cir. 1996), cert. denied, 117 S.Ct. 1842 (1997). Dong v. Smithsonian Inst., 125 F.3d 877 (D.C. Cir. 1997) cert. denied, Dong v. Smithsonian Inst., 524 U.S. 922 (1998). (holding that Smithsonian lacks both the "authority" necessary for it to qualify as an "authority of the government of the United States" under § 551(1) and the executive department status necessary under § 552(f)).
  
- d. An agency must possess and control the record. DOD Reg. 5400.7-R, para C1.4.3.3; AR 25-55, para 1-402(c). Department of Justice v. Tax Analysts, 492 U.S. 136 (1989).
  - (1) Other agency records. McGehee v. CIA, 697 F.2d 1095 (D.C. Cir. 1983).
  
  - (2) Records generated from sources outside the Government. Records must be either government-owned or subject to substantial government control or use. Burka v. HHS, 87 F.3d 508 (D.C. Cir. 1996); Hercules, Inc. v. Marsh, 838 F.2d 1027 (4th Cir. 1988).
  
  - (3) Personal records. Documents created or maintained without official requirement for the convenience of the creator as a memory refresher and not shared with others for agency use. DOD Reg. 5400.7-R, para C1.4.3.2.3; Gran Cent. Partnerships, Inc. v. Cuomo, 166 F.3d 473 (2d Cir. 1999) (holding affidavit by supervisor stating subordinates’ handwritten notes were “personal records” was insufficient to prove them to be not “agency records”) Bureau of Nat’l Affairs v. United States Department of Justice, 742 F.2d 1484 (D.C. Cir. 1984).

- (4) Research Data. Amendment to the Fiscal Year 1999 Omnibus Appropriations Bill required modification of OMB Circular A-110 to allow private parties access to non-profit grantee-held research data through FOIA request (modifying Supreme Court decision in Forsham v. Harris, 445 U.S. 169 (1980)).
- 2. FOIA does not require agencies to create or retain records. DOD Reg. 5400.7-R, para C1.4.3.2.3; AR 25-55, para 1-506.
  - a. A request for uncompiled data (selective information) is not a request for records. Borom v. Crawford, 651 F.2d 500 (7th Cir. 1981) (affirming summary judgment order denying request for parole data compiled by race when no such compilation existed); Krohn v. DOJ, 628 F.2d 195 (D.C. Cir. 1980).
  - b. The 1996 amendments to the Freedom of Information Act (the Electronic Freedom of Information Act Amendments, or "EFOIA") require "reasonable efforts" in conducting electronic searches, and give the requester choice of format, where readily reproducible. Dayton Newspapers, Inc. v. Department of the Air Force, 35 F. Supp.2d 1033 (S.D. Ohio 1998).
  - c. DOD components may create a new record when more useful to requester or less burdensome to agency. DOD Reg. 5400.7-R, para C1.5.7; AR 25-55, para 1-506.
  - d. Note: while FOIA does not require agencies to create or retain records, the Federal Records Act (now known as the National Archives Act), 44 U.S.C. § 2101 et seq., does require record retention pursuant to National Archives and Records Administration schedules. When this outline was printed, the National Archivist was involved in litigation over his orders concerning the retention/destruction of electronic mail/messages.

D. Other Factors Affecting Release.

- 1. Rule of Segregability. § 552(b); DOD Reg. 5400.7-R, para C5.2.4.

- a. Must segregate and release portions of agency records not subject to a withholding exemption. Trans-Pacific Policing Agreement v. United States Customs Serv., 177 F.3d 1022 (D.C. Cir. 1999)(remanded for determination if 10 digit shipping code number could be segregated); Ogelsby v. Department of the Army, 79 F.3d 1172 (D.C. Cir. 1996); Army Times Publishing Co. v. Department of the Air Force, 998 F.2d 1067 (D.C. Cir. 1993).
  - b. Nonexempt material is not “reasonably segregable” when efforts to segregate amount to an inordinate burden on the agency. Lead Industries Association v. OSHA, 610 F.2d 70 (2d Cir. 1979).
2. Status and purpose of requester.
  - a. As a general rule, status and purpose of the requester are not considered by the agency except in deciding procedural matters such as fee issues. Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749 (1989).
  - b. A foreign government is a person under the Act. DOD Reg. 5400.7-R, para C5.1.3; Neal-Cooper Grain Co. v. Kissinger, 385 F. Supp. 769 (D.D.C. 1974).
3. Discretionary Release of exempt records.
  - a. Agencies may make discretionary releases of information that is exempt from disclosure under one of the FOIA’s exemptions. The FOIA’s exemptions do not require the withholding of information.
  - b. Agencies now have greater discretion in determining whether to release requested information. On 12 October 2001, Attorney General Ashcroft issued new DOJ policy guidance regarding discretionary releases of exempt material. Under the new policy, DOJ will defend any agency decision to withhold information that is founded upon a “sound legal basis.” This “sound legal basis” standard replaces the DOJ’s earlier “foreseeable harm” standard.



- c. “Foreseeable Harm.” In 1993, Attorney General (AG) Janet Reno explained that the FOIA's “primary object” is to achieve “maximum responsible disclosure of government information,” therefore, the DOJ would “defend the assertion of a FOIA exemption only in those cases where the agency reasonably foresees that disclosure would be harmful to an interest protected by that exemption.” This “foreseeable harm” standard was known as the “Reno Rule.” The AG recognized that information falling under Exemptions 1,3,4,6, and 7(c ) is not appropriate for discretionary FOIA disclosure because a presumption of “foreseeable harm” attaches to that information. [See, Attorney General's Memorandum for Heads of Departments and Agencies regarding the Freedom of Information Act (October 4, 1993); Freedom of Information Act Guide & Privacy Act Overview (May 2000), “Discretionary Disclosure and Waiver”; Attorney General's Memorandum (September 3, 1999) (reiterating Clinton Administration's “openness-in-government” policy).]

E. Reasons For Not Releasing a Record. DOD Reg. 5400.7-R, para C5.2.2.

1. No responsive records after a “reasonable” search.
2. Record transferred.
3. Agency neither controls nor otherwise possesses record.
4. Insufficient description of record.
5. Failure to comply with agency's procedural requirements.
6. Request is withdrawn.
7. Fee dispute.
8. Duplicate Request.
9. The information is not, definitionally, a "record." Oglesby v. U.S. Department of the Army, 920 F.2d 57 (D.C. Cir. 1990).

10. The request is denied in whole or part IAW with FOIA.

#### IV. NINE EXEMPTIONS PERMIT WITHHOLDING.

##### A. Exemption 1: Classified Records.

1. Executive Order (EO) 12,958 (April 17, 1995), 3 C.F.R. § 335 (1996); 50 U.S.C. § 435 (1996); implemented by DOD 5200.1-R, AR 380-5. Current order superseded EO 12,356 (1982).
  - a. Security classifications: Confidential, Secret, Top Secret.
  - b. For official use only (FOUO). See DOD Reg. 5400.7-R, C4.1.2; and C4.2.1; AR 25-55, ch. IV. FOUO is not a proper classification under Exemption 1
2. Proper classification.
  - a. Court conducts “de novo” review of both procedural and substantive propriety of classification. Allen v. CIA, 636 F.2d 1287 (D.C. Cir. 1980).
  - b. Court may conduct “in camera” inspection in its sound discretion, although the court should give substantial weight to agency affidavits. Young v. CIA, 972 F.2d 536 (4th Cir. 1993).
  - c. Courts will give great deference to agency’s expertise and judgment on classification. Weatherhead v. United States, 157 F.3d 735 (9<sup>th</sup> Cir. 1998), cert. granted, 120 S. Ct. 34 (1999), cert. dismissed and vacated, 120 S.Ct. 577 (1999)(Court dismisses for mootness, but vacates 9<sup>th</sup> Circuit’s holding that classification decisions are not given deference unless agency first makes acceptable showing of harm.); Goldberg v. Department of State, 818 F.2d 71 (D.C. Cir. 1987); Taylor v. Department of the Army, 684 F.2d 99 (D.C. Cir. 1982).
3. Segregability applies even in Exemption 1 cases. Ogelsby v. Department of the Army, 79 F.3d 1172 (D.C. Cir. 1996); Ogelsby v. Department of the Army, 920 F.2d 57 (D.C. Cir. 1990).

4. Operational Security.
  - a. Post-request classification is authorized. E.O. 12,958, section 1.8(d), DOD Reg. 5400.7-R, para C3.2.1.1, No. 1, AR 25-55, para 5-100c.
  - b. Compilation/Mosaic Theories of classification (circumstances when apparently harmless items of information, assembled together, reveal classified information). American Friends Serv. Comm. v DOD, 831 F.2d 441 (3d Cir. 1987); Taylor v. Department of the Army, 684 F.2d 99 (D.C. Cir. 1982); Halperin v. CIA, 629 F.2d 144, 150 (D.C. Cir. 1980). Is not limited only to Exemption 1 situations.
  - c. Previous Release of Classified Records Does Not Prevent Subsequent Withholding of Similar Type of Information. Aftergood v. CIA, 1999 U.S. Dist. LEXIS 18135 (D.D.C. Nov. 15, 1999)(CIA properly withheld it's fiscal year 1999 total budget request because it may damage national security and reveal "intelligence sources and methods" even though it released the previous two years' budgets).
5. Glomar denial/Glomarization (agency refusal to confirm or deny the existence/nonexistence of requested information whenever the fact of its existence/nonexistence is itself classifiable). DOD Reg. 5400.7-R, para C3.2.1.1.1, Number 1(a); Phillippi v. CIA, 546 F.2d 1009 (D.C. Cir. 1976). Is not limited only to Exemption 1 situations.

**B. Exemption 2: Internal Personnel Rules and Practices.**

1. Trivial matters - "low 2." DOD Reg. 5400.7-R, para C3.2.1.2.2; Department of the Air Force v. Rose, 425 U.S. 352 (1976); Pruner v. Department of the Army, 755 F.Supp. 362 (D. Kan. 1991).
2. Circumvention of agency regulation - "High 2."
  - a. Proper: Kaganove v. EPA, 856 F.2d 884 (7th Cir. 1988); Crooker v. BATF, 670 F.2d 1051 (D.C. Cir. 1981)(en banc) (withholding from ex-con who seeks ATF surveillance manuals); DOD Reg. 5400.7-R, para C3.2.1.2, No. 2; AR 25-55, para 3-200, No. 2. See also Exemption 7(e) (5 U.S.C. § 552(b)(7)(E)).

- b. Improper: Dayton Newspapers, Inc. v. Department of the Air Force, 35 F. Supp.2d 1033 (S.D. Ohio 1998)(holding that medical malpractice settlement statistics in electronic database were not “internal personnel rules or practices,” even though disclosure “would compromise the government’s bargaining position.”).

**C. Exemption 3: Other Federal Withholding Statutes.**

1. FOIA Exemption 3 permits withholding of information prohibited from disclosure by another statute. One of two disjunctive requirements must be met to withhold under this exemption: the withholding statute must either "(A) [require] that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establish particular criteria for withholding or refer to particular types of matters to be withheld." A statute thus falls within the exemption's coverage if it satisfies any one of its disjunctive requirements.
2. Examples of commonly used federal withholding statutes:
  - a. 42 U.S.C. § 290dd-3, Confidentiality of patient records in an alcohol and drug treatment program.
  - b. 10 U.S.C. § 1102, DOD Medical Quality Assurance Records.
  - c. 10 U.S.C. § 2305 and 41 U.S.C. § 253b, prohibiting release of certain contractual proposals.
  - d. 10 U.S.C. §130(b), allows withholding of information on personnel of overseas, sensitive, or routinely deployable units. [Note: On 9 November 2001, DoD issued new guidance on the disclosure of personally identifying information. A copy of this guidance is at Appendix B.]
3. Statutes commonly mistaken for Exemption 3 withholding statutes:
  - a. 18 U.S.C. § 1905. The Trade Secrets Act.
  - b. 5 U.S.C. § 552a. The Privacy Act.

**D. Exemption 4: Trade Secrets, and Commercial and Financial Records.**

FOIA permits withholding records that are “trade secrets and commercial or financial information obtained from a person that are privileged or confidential;”

1. From a person. Generally, all but the Federal Government are “persons” subject to Ex. 4 protection. Nadler v. FDIC, 92 F.3d 93 (2d Cir. 1996); Stone v. Export-Import Bank of United States, 552 F.2d 132 (5th Cir. 1977).
2. Trade Secrets. A narrow definition for purposes of FOIA. Public Citizen Health Research Group v. FDA, 704 F.2d 1280 (D.C. Cir. 1983).

“[A] secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort.”

**OR**

3. Commercial or financial information. Nonprofit entities can submit commercial information. Critical Mass Energy Project v. NRC, 975 F.2d 871 (D.C. Cir. 1992); American Airlines, Inc. v. National Mediation Bd., 588 F. 2d 863 (2d Cir. 1978).
  - a. Privileged information. Rarely used as a basis for withholding. Sharyland Water Supply Corp. v. Black, 755 F.2d 397 (5th Cir.); Indian Law Resource Center v. Department of the Interior, 477 F. Supp. 144 (D.D.C. 1979).
  - b. Confidential information. Key definition used as a basis of withholding. Case law has differentiated between “Required” and “Voluntary” submissions of information. Discussed below. DOD 5400.7-R, para C3.2.1.4, No. 4; AR 25-55, para 3-200, No. 4.
    - (1) REQUIRED Information. National Parks & Conservation Association v. Morton, 498 F.2d 765 (D.C. Cir. 1974).
      - (a) The National Parks test.

- (i) Would disclosure likely “impair ability of agency to obtain necessary information in the future”? See Orion Research Inc. v. EPA, 615 F.2d 551 (1st Cir. 1980).

**OR**

- (ii) Would disclosure likely cause “substantial harm to the competitive position of the person from whom the information was obtained”? See Hercules, Inc. v. Marsh, 839 F.2d 1027 (4th Cir. 1988) (holding no competition for Radford Army Ammunition Plant contract); Gulf & Western Industries Inc. v. United States, 615 F.2d 527 (D.C. Cir. 1979).
- (b) How does agency determine confidentiality? See EO 12,600 (June 23, 1987) and DOD Reg. 5400.7-R, para C3.2.1.4.8; AR 25-55, para 5-207.
  - (c) Must develop and implement procedures to create a complete “administrative record” that will support the agency’s decision to release the requested information under FOIA. Acumenics Research & Technology v. Department of Justice, 843 F.2d 800 (4th Cir. 1988) (“Reverse FOIA” case). See Federal Electric Corp. v. Carlucci, 866 F.2d 1530 (D.C. Cir. 1989) (An example of failing to create an Agency Record).
  - (d) Case law analyses of the “substantial harm to the competitive position of the person from whom the information was obtained.”

- (i) Cases finding competitive harm: McDonnell Douglas Corp. v. NASA, 180 F.3d 303 (D.C. Cir. 1999)(holding that release of unit price in rocket contract substantiates substantial competitive harm allowing customers to “ratchet down” prices); Gilmore v. United States Dep't of Energy, No. 95-0285 (N.D. Cal. Mar. 13, 1998); RMS Indus. v. DOD, No. C-92-1545 (N.D. Cal. Nov. 24, 1992); Gulf & Western Indus. v. United States, 615 F.2d 527 (D.C. Cir. 1979); National Parks, *supra*).
    - (ii) Cases finding *no* competitive harm: GC Micro Corp. v. DLA, 33 F.3d 1109 (9th Cir. 1994); Pacific Architects & Eng'rs v. United States Dep't of State, 906 F.2d 1345 (9<sup>th</sup> Cir. 1990) (reverse FOIA); Hercules, Inc., *supra*.
  - (e) FAR, 48 C.F.R. §§ 15.503(b)(iv), 15.506(d)(2), now requires disclosure of unit prices, upon request, in government contracts solicited after 1 January 1998. Unit prices (as well as other items in an unsuccessful proposal) of unsuccessful offerors are not releasable. 10 U.S.C. § 2305(g)(2) or 41 U.S.C. § 253b(m)(2).
4. *VOLUNTARILY* Submitted Information. Critical Mass Energy Project v. NRC, 975 F.2d 871 (D.C. Cir. 1992).

a. The Critical Mass test.

- (1) Was the information provided voluntarily?

Contract bids and proposals are considered "required submissions" and therefore releasability is analyzed under the National Parks analysis. McDonnell Douglas Corp. v. NASA, 981 F.Supp 12 (D.D.C. 1997) (Information provided in response to a Request for Proposals is a required submission); *see also* DFOISR Memorandum, SUBJECT: FIOA Policy on DOD application of Critical Mass (etc.), 93-CORR-014, 27 July 1993; DFOISR

Memorandum, SUBJECT: Internal Guidance on DOD Application of Critical Mass (etc.), 93-CORR-094, 23 March 1993.

**AND**

- (2) Is it the kind of information that the provider would not customarily make available to the public? Animal Legal Defense Fund v. Dep't of the Air Force, 44 F.Supp. 2d 295 (D.D.C. 1999)(holding that the Vaughn declaration regarding the withholding of records about Chimpanzee disposal failed to meet voluntariness test because it did not explain: 1)“commercial” nature of record, 2) that the information was provided voluntarily or 3) that the submitter customarily withholds such information from the public).
5. Determining whether business information is exempt--notice of proposed release to the submitter of information—“Reverse FOIA” (Should you disclose purportedly exempt (b)(4) information?). EO 12,600 (July 23, 1987); DOD Reg. 5400.7-R, para C3.2.1.4.8 and C5.2.8.; AR 25-55, para 5-207.
- a. Chrysler Corp. v. Brown, 441 U.S. 281 (1979). Discretionary release permissible if otherwise “authorized by law.”
    - (1) Reverse FOIA. Gulf Oil Corp. v. Brock, 778 F.2d 834 (D.C. Cir. 1985).
    - (2) Standard of review of agency action under Administrative Procedure Act (APA)--review on the administrative record using the arbitrary and capricious standard. Acumenics Research & Technology v. Department of Justice, 843 F.2d 800 (4th Cir. 1988); General Electric Co. v. NRC, 750 F.2d 1394 (7th Cir. 1984).
  - b. Trade Secrets Act. 18 U.S.C. § 1905; CNA Financial Corp. v. Donovan, 830 F.2d 1132 (D.C. Cir. 1987).
    - (1) Trade Secrets Act applies broadly to virtually all business information and prohibits agency disclosure except as “authorized by law.”



- (2) FOIA provides such “authority” to disclose business information only if it is nonexempt. CNA Fin. Corp., supra.
  - (3) Submitter notice (i.e., notice of proposed release to the submitter of information) for disclosure of contractor's unit price not required because disclosures pursuant to a properly promulgated and statutorily based agency regulation, 48 C.F.R. §§ 15.503(b)(iv), 15.506(d)(2), are “authorized by law.” Chrysler Corp. v. Brown, 441 U.S. 281, 295-316 (1979).
- c. DOD solution. DOD Reg. 5400.7-R, paras. C3.2.1.4 and C5.2.8.1 – C5.2.8.3. (Compare AR 25-55, para 3-101 (No release absent “compelling public interest.”)) Remember, DOD is no longer bound by the DOJ’s former “foreseeable harm” standard. Primary DOD concern is to ensure decisions to withhold information are based upon a “sound legal basis.”

**E. Exemption 5: Privileged Memoranda & Internal Agency Communications.**

The FOIA permits withholding records that are “inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency.”

- 1. Purpose.
- 2. Scope.
  - a. Deliberative Process Privilege.

- (1) Purpose--to encourage open, frank discussions between subordinates and superiors; protect against premature disclosure of proposed policies before they are adopted; and protect against public confusion that might result from disclosure of reasons and rationales that were not ultimately the grounds for the agency's action. Russell v. Department of the Air Force, 682 F.2d 1045 (D.C. Cir. 1982); Judicial Watch, Inc. v. United States Dep't of Justice, No. 97-2869 (D.D.C. Feb 22, 2000)(deliberative process privilege protects handwritten notes by the Attorney General which reflect distillations of issues that she memorialized for later reference as part of her decision making process.).
- (2) "Factual-deliberative" distinction.
  - (a) Deliberative process privilege does not generally protect purely factual matters. EPA v. Mink, 410 U.S. 73 (1973).
  - (b) Can withhold facts if they are "inextricably intertwined" with deliberative material. Ryan v. DOJ, 617 F.2d 781 (D.C. Cir. 1980); Jowett, Inc. v. Dep't of Navy, 729 F. Supp. 871 (D.D.C. 1989).
  - (c) May withhold facts if release would disclose "deliberative process." Mead Data Central, Inc. v. Department of the Air Force, 566 F.2d 242 (D.C. Cir. 1977) (holding that "Exemption five is intended to protect the deliberative process of government and not just deliberative material. . . . In some circumstances . . . the disclosure of even purely factual material may so expose the deliberative process within an agency that it must be deemed exempted by section 552(b)(5).")
- (3) "Predecisional v. Postdecisional" distinction.

- (a) May withhold predecisional documents. NLRB v. Sears, 421 U.S. 132 (1975). To determine whether a document is “predecisional,” ask, “Was it prepared to assist an agency decision maker in arriving at a decision rather than support a decision already made?” Lurie v. Dep’t of the Army, 970 F.Supp. 19, 28 (D.D.C. 1997).
  - (b) Cannot withhold predecisional materials when final decision-maker “expressly adopts or incorporates them by reference.” NLRB v. Sears; Swisher v. Department of the Air Force, 660 F.2d 369 (8th Cir. 1981).
- (4) Memoranda prepared by outside consultants fall within the privilege. Formaldehyde Inst. v. HHS, 889 F.2d 1118 (D.C. Cir. 1989).
- b. Attorney Work-Product Privilege.
  - (1) Materials “prepared in anticipation of litigation or for trial by or for [a] party or by or for that...party’s representative (including the...party’s attorney, consultant, ...or agent).” Fed.R.Civ.P. 26(b)(3); FTC v. Grolier, 462 U.S. 19 (1983); Safecard Services, Inc. v. SEC, 926 F.2d 1197 (D.C. Cir. 1991).
  - (2) Courts have recognized that the privilege extends to prepared in anticipation of litigation even when no specific claim is pending. Schiller v. NLRB, 964 F.2d 1205 (D.C. Cir. 1992) (holding that documents that provide tips on handling future litigation are covered by the work product privilege).
- c. Attorney-Client Privilege. The confidential communications from clients to the counsel made for the purpose of securing legal advice or services; and the communications from attorneys to their clients if the communications rest "on confidential information obtained from the client." In re Sealed Cases, 737 F.2d 94, 98-99 (D.C. Cir. 1984). Mead Data Central, Inc. v. Department of the Air Force, 566 F.2d 242 (D.C. Cir. 1977).

- d. Trade Secrets Or Commercial Information Privilege. Federal Open Market Comm. v. Merrill, 443 U.S. 340 (1979); Morrison-Knudsen Co. v. Department of the Army, 595 F. Supp. 352 (D.D.C. 1984), aff'd 762 F.2d 138 (D.C. Cir. 1985) (table cite).
- e. Protection Of Certain Confidential Witness Statements. United States v. Weber Aircraft Corp., 465 U.S. 792 (1984); Ahearn v. Department of the Army, 583 F. Supp. 1123 (D. Mass. 1984).

## **F. Exemption 6: Protection of Personal Privacy.**

FOIA permits withholding records that are “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;”

- 1. Threshold determination- “personnel and medical files and similar files...” Department of State v. Washington Post Co., 456 U.S. 595 (1986); Department of the Air Force v. Rose, 425 U.S. 352 (1976); New York Times Co. v. NASA, 920 F.2d 1002 (D.C. Cir. 1990).
- 2. The balancing test. Department of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989). See also, Bibles v. Oregon Natural Desert Association, 117 S.Ct. 795 (1997).
  - a. Invasion of privacy -- define privacy interest involved.
    - (1) Deceased persons have no privacy rights. Na Iwi O Na Kupuna v. Dalton, 894 F.Supp 1397 (D. Hi. 1995) (Reverse FOIA suit).
    - (2) Next-of-kin may have, in rare situations, a colorable privacy interest. New York Times Co. v. NASA, 920 F.2d 1002 (D.C. Cir. 1990) (en banc). But see, Outlaw v. Department of the Army, 815 F.Supp. 505 (D.D.C. 1993).

- b. Public interest in disclosure -- the Reporters Committee decision has limited the concept of public interest under the FOIA to the “core purpose” for which Congress enacted it: To “[shed] light on an agency's performance of its statutory duties.” Information that does not directly reveal the operations or activities of the federal government “falls outside the ambit of the public interest that the FOIA was enacted to serve.”
- 3. Application of the balancing test.
  - a. Articulate the privacy interest involved.
  - b. Articulate the public interest involved.
  - c. Strike the balance.
- 4. Examples. FLRA v. DOD, 114 S.Ct. 1006 (1994) (a leading case delineating the “core interests” of FOIA; thorough balancing of interests analysis); Sheet Metal Workers Int'l Ass'n. v. United States Air Force, 63 F.3d 994 (10th Cir. 1995) (Sheet Metal Workers union engaged in “Davis-Bacon” monitoring--release of payroll records with names and addresses of workers employed on government contracts constitutes a clearly unwarranted invasion of personal privacy); McCutchen v. HHS, 30 F.3d 183 (D.C. Cir. 1994) (names of persons exonerated by investigation protected from disclosure); Providence Journal Co. v. Department of the Army, 981 F.2d 552 (1st Cir. 1992) (the higher the rank, the greater the public interest might be in release of agency record concerning disciplinary action).

See also Chin v. Department of the Air Force, No. 97-2176 (W.D. LA June 24, 1999) (deciding two issues: 1) that privacy outweighed the public interest in withholding of identities in general request for fraternization investigations and 2) that entire investigation can be withheld in request for specific investigation); Mueller v. Department of the Air Force, 63 F. Supp. 2d 738 (E.D. Va. 1999) (denial of request for dismissed non-judicial punishment proceeding documents because public interest was minimal and would shed little light on Air Force's overall conduct).

5. Privacy Glomarization. Department of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989); Beck v. Department of Justice, 997 F.2d 1489 (D.C. Cir. 1993); DOD Reg. 5400.7-R, para C3.2.1.6.5.1-2.

**G. Exemption 7: Law Enforcement Records.**

1. Records or information compiled for law enforcement purposes.
  - a. Only applies to investigations conducted for a law enforcement purpose. *Compare* Irons v. Bell, 596 F.2d 468 (1st Cir. 1979) *with* Church of Scientology v. Department of the Army, 611 F.2d 738 (9th Cir. 1980). *See* AR 25-55, para 1-407.
  - b. Information that was originally compiled for law enforcement purposes, but later summarized in a new document not prepared for law enforcement purposes, is protected under the exemption. Abramson v. FBI, 456 U.S. 615 (1982).
  - c. Exemption will protect non-law enforcement records that are “recompiled” for law enforcement purposes. John Doe Agency v. John Doe Corp., 493 U.S. 146 (1989).
2. May withhold records under this exemption, but only to the extent disclosure:
  - “(A) could reasonably be expected to interfere with enforcement proceedings,
  - “(B) would deprive a person of a right to a fair trial or an impartial adjudication,
  - “(C) could reasonably be expected to constitute an unwarranted invasion of personal privacy,
  - “(D) could reasonably be expected to disclose the identity of a confidential source. . . in a criminal or national security investigation . . . or information furnished by a confidential source,

“(E) would disclose techniques and procedures or would disclose guidelines for law enforcement investigations or prosecutions if disclosure could reasonably be expected to risk circumvention of the law, or

“(F) could reasonably be expected to endanger the life or physical safety of any person.”

3. Glomar Responses are also appropriate to protect privacy under Exemption 7(C). DOD Reg. 5400.7-R, para C3.2.1.7.1.3.1-3.
4. Exemption 7(C) may protect privacy of the close survivors of the deceased. Accuracy in Media v. National Parks Serv., 194 F.3d 120 (D.C.Cir. 1999)(holding that autopsy photos could be withheld because of the privacy interests of the spouse, parents, and children of the deceased”).

#### **H. Exemptions 8 (Financial Institutions Information).**

#### **I. Exemption 9 (Geological and Geophysical Information).**

### **V. EXCLUSIONS.**

#### **A. Exclusion 1.**

1. Investigation or proceedings involving possible violation of criminal law, and
2. Subject unaware of pendency of investigation or proceedings, and
3. Disclosure of existence of records could reasonably be expected to interfere with enforcement proceedings.

#### **B. Exclusion 2.**

1. Informant records maintained under informant’s name or personal identifier, and
2. Maintained by a criminal law enforcement agency,

3. Unless informant's status as an informant has been officially confirmed.
- C. Exclusion 3.
1. Records maintained by FBI, and
  2. Pertaining to foreign intelligence or counterintelligence, or international terrorism, and
  3. Existence of records is classified.

## **VI. RELEASE UPON REQUEST.**

### **A. What Is A Proper Request?**

1. Must request an "agency record." DOD Reg. 5400.7-R, para, 1-402; AR 25-55, para 1-402.
2. Must reasonably describe the record. DOD Reg. 5400.7-R. para, 1-507; AR 25-55, para 1-507. See Ruotolo v. Department of Justice, 53 F.3d 4 (2d Cir. 1995); AFGE v. Department of Commerce, 907 F.2d 203 (D.C. Cir. 1990); Mason v. Calloway, 554 F.2d 129 (4th Cir.).
3. Must comply with agency rules.
  - a. Written request required. DOD Reg. 5400.7-R, para 1-401 ("written requests may be received by postal service or other commercial delivery means, by facsimile, or electronically.") AR 25-55, paras. 1-401 and 1-503.
  - b. Must express willingness to pay fees. DOD Reg. 5400.7-R, paras. 1-401 and 1-503; AR 25-55, paras. 1-401 and 1-503 1-509.
  - c. Must direct request to the proper custodian. DOD Reg. 5400.7-R, 1-503; AR 25-55, para 1-503.



- d. Must expressly or impliedly invoke FOIA or an implementing regulation. DOD Reg. 5400.7-R, paras. 1-401 and 1-503; AR 25-55, paras. 1-401 and 1-503.

B. Agency Response Requirements.

- 1. Statutory time limits. 5 U.S.C. §§ 552(a)(6)(A)(i), (ii); 552(a)(6)(B)(i).
  - a. Initial agency response - 20 working days.
  - b. Time period for processing a FOIA request may be extended by 10 working days by written notice to the requester explaining why an extension is needed and stating when a determination will be made on the request.
  - c. Requester dissatisfied with agency response - shall be advised to file an appeal so that it reaches the agency appellate authority no later than 60 calendar days from the date of receipt of the agency response. DOD Reg. 5400.7-R, para 5-302; AR 25-55, para 5-302.
  - d. Agency response to Appeals - 20 working days.
  - e. If agency shows failure to meet time limits was result of exceptional circumstances and it is applying due diligence in processing request, then court can allow additional time for administrative processing of request. §552(a)(6)(C). Open America v. Watergate Special Prosecution Force, 547 F.2d 605 (D.C. Cir. 1976).
  - f. An agency's failure to comply with the time limits for either the initial request or the administrative appeal may be treated as a "constructive exhaustion" of administrative remedies, and a requester may immediately seek judicial review. § 552(a)(6). *See, Spannaus v. United States Dep't of Justice*, 824 F. 2d 52 (D.C. Cir. 1987).

2. Agency must make “reasonable efforts” to locate records and court may require agency to demonstrate adequacy of search. Valencia-Lucena v. United States Coast Guard, 180 F.3d 321 (D.C. Cir. 1999) (agency failed to conduct reasonable search for missing pages of ship’s logbook); Dayton Newspapers, Inc. v. Department of the Air Force, 35 F.Supp. 2d 1033 (S.D. Ohio 1998)(holding that 51 hours of electronic searching and assembly is “small price to pay”); Oglesby v. Department of the Army, 79 F.3d 1172 (D.C. Cir. 1996); Marks v. United States, 578 F.2d 261 (9th Cir. 1978). But see Ruotolo v. Dep’t. of Justice, 53 F.3d 4 (2d Cir. 1995).
3. Agency must **segregate and release** nonexempt information. Trans-Pacific Policing Agreement v. United States Customs Serv., 177 F.3d 1022 (D.C. Cir. 1999)(remanded for determination if 10 digit shipping code number could be segregated); Dynalelectron Corp. v. Department of the Air Force, No. 83-3399 (D.D.C. Oct. 30, 1984).
4. Service’s release and processing procedures. DOD Reg. 5400.7-R, ch. 5; AR 25-55, ch. V.

C. Fees and Fee Waivers. DOD Reg. 5400.7-R, ch. 6.

1. Fee charges are based on status and purpose (motive) of requester - three categories of requesters.
  - a. First - Most favored category: (1) educational or noncommercial scientific institutions (whose purpose is scholarly or scientific research) or (2) representatives of the news media are charged only for duplication costs after the first 100 pages. National Security Archive v. Dep’t of Defense, 880 F.2d 1381 (D.C. Cir. 1989); Stanley v. Department of Defense, et al. No. 98-CV-4117 (S.D. Ill. June 22, 1999).
  - b. Second - Least favored category: requesters of records for commercial use are charged for search, duplication, and review.
  - c. Third category: All other requesters are charged for search after the first 2 hours and duplication after the first 100 pages.
2. Fee waiver, unlike the substantive FOIA analysis, is based on status and purpose (motive) of requester.

- a. Fee waiver standard. McClellan Ecological Seepage Situation v. Carlucci, 835 F.2d 1282 (9th Cir. 1987) (applying and implicitly approving DOD's regulatory implementation of fee waiver provision).
- b. "\$15.00 Rule." Automatic waiver applies if costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee. When assessable costs for a FOIA request total \$15.00 or less, fees shall be waived automatically for all requesters, regardless of category. DOD Reg. 5400.7-R, para 6-103, AR 25-55, para 6-103.
- c. "\$250.00 Rule." When the agency estimates or determines that allowable charges are likely to exceed \$250.00, notify the requester and obtain satisfactory assurance of full payment, or for advance payment of up to full amount in the case of requester with no history of payment. DOD Reg. 5400.7-R, para 6-104b(6). AR 25-55, para 6-104b(6).

## VII. FOIA LITIGATION.

- A. Requester Must Exhaust Administrative Remedies. 5 U.S.C. § 552(a)(6)(C)(i); Ogelsby v. Department of the Army, 920 F.2d 57 (D.C. Cir. 1990).
- B. Circumstances Authorizing Stays Were Narrowed by E-FOIA Amendments. 5 U.S.C. § 552(a)(6)(ii); Open America v. Watergate Special Prosecution Force, 547 F.2d 605 (D.C. Cir. 1976).
- C. Judicial Review. 5 U.S.C. § 552(a)(4)(B); DOD Reg. 5400.7-R, ch. 5, sec. 4.
  1. Scope of review - *de novo*.
  2. *In camera* inspection is "within the broad discretion of the court." Quinon v. FBI, 86 F.3d 1222 (D.C. Cir. 1996).
  3. Vaughn Index. A court may order an agency to submit a detailed index of the documents it seeks to withhold and the reasons justifying such withholding. Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973); Compare, Wiener v. FBI, 943 F.2d 972 (9th Cir. 1991) with Maynard v. CIA, 986 F.2d 547 (1st Cir. 1993).

4. Burden of Proof. Burden is on the government to establish that a document is exempt from disclosure. 5 U.S.C. § 552(a)(4)(B).
- D. Attorney Fees and Costs. § 552(a)(4)(E). Weisberg v. DOJ, 848 F.2d 1265 (D.C. Cir. 1988).
1. Attorney fees are within the discretion of the court when a FOIA plaintiff “substantially prevails.” State of Texas v. Interstate Commerce Commission, 935 F.2d 728 (5th Cir. 1991); Education/Instruction, Inc. v. HUD, 649 F.2d 4 (1st Cir. 1981).
  2. Four factors that courts will generally consider to determine whether an award of fees and costs is appropriate under FOIA after determining the requester’s eligibility:
    - a. Benefit to the public derived from the case,
    - b. Commercial benefit to the requester,
    - c. Nature of requester’s interest in the records sought, and
    - d. Whether the agency’s withholding of records had a reasonable basis in law.

Church of Scientology v. USPS, 700 F.2d 486 (9th Cir. 1983); LaSalle Extension University v. FTC, 627 F.2d 481 (D.C. Cir. 1980).
  3. Test to determine whether a plaintiff “substantially prevailed” involves showing that prosecution of action was needed and that action had causative effect on delivery of information. DOJ v. Weisberg, 848 F.2d 1265 (D.C. Cir. 1988).
  4. Commercial Requesters--those requesters seeking information for commercial gain should be allowed attorney fees only where there is clear and positive benefit to the public and where the agency withheld information without a reasonable basis in law. Tax Analyst v. U.S. Department of Justice, 965 F.2d 1092 (D.C. Cir. 1992); *Cf.* Aviation Data Service v. FAA, 687 F.2d 1319 (10th Cir. 1982).

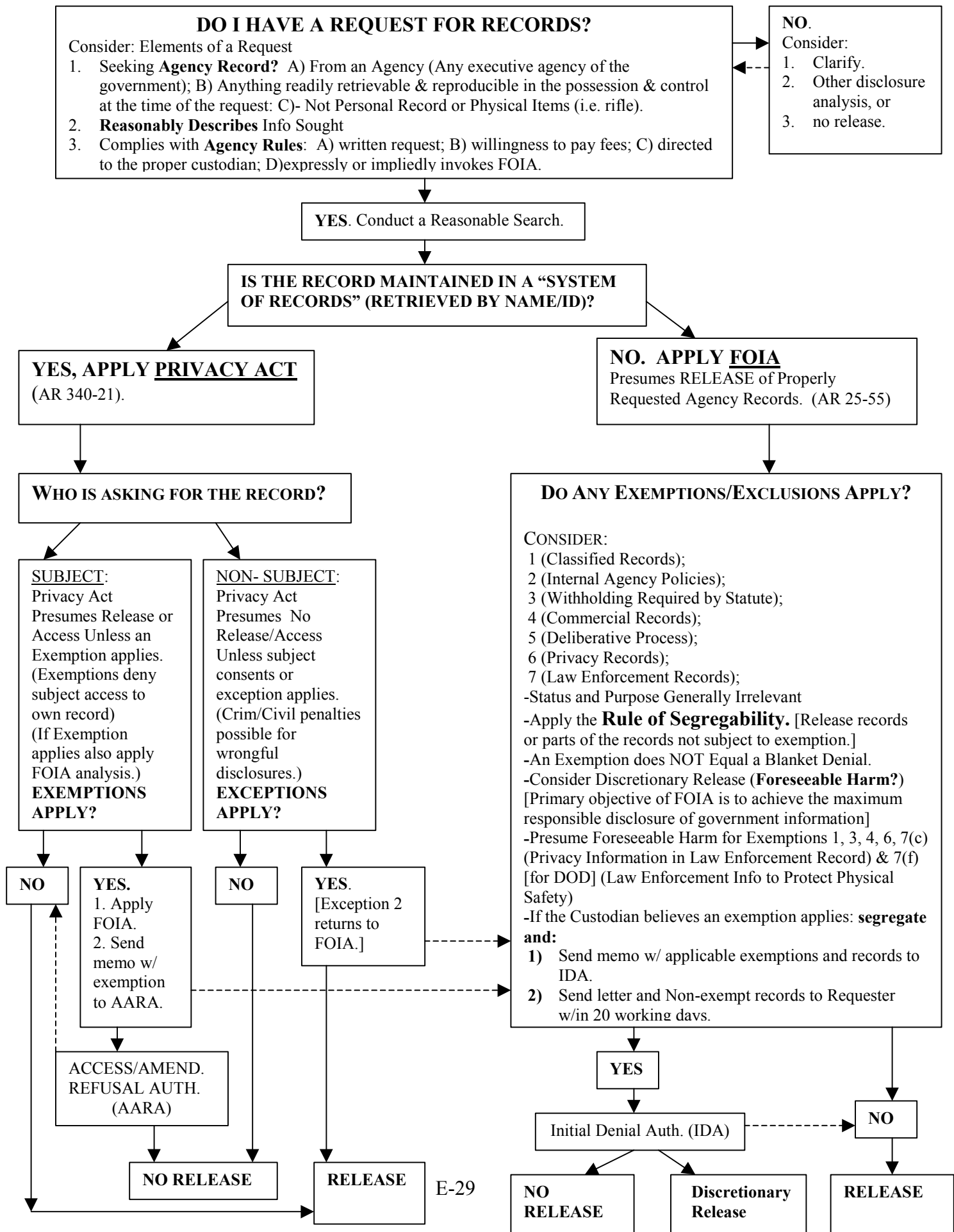
5. No attorney fees for *pro se* litigants. *Burka v. HHS*, 87 F.3d 508 (D.C. Cir. 1996).
- E. Six year statute of limitations for filing FOIA lawsuits. 28 U.S.C. § 2401; *Spannus v. DOJ*, 824 F.2d 52 (D.C. Cir. 1987).

## **VIII. CONCLUSION**

## **IX. APPENDIX A—FOIA/PA ANALYSIS TEMPLATE**

## **X. APPENDIX B—MEMORANDA REGARDING DEPT. OF JUSTICE’S 2001 FOIA DISCLOSURE POLICY AND DOD GUIDANCE**

## **FOIA/PA ANALYSIS TEMPLATE**





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Telephone: (202) 514-3642

Washington, D.C. 20530

October 15, 2001

**MEMORANDUM**

TO: Principal FOIA Administrative and Legal  
Contacts at All Federal Agencies

FROM: Richard L. Huff  
Daniel J. Metcalfe  
Co-Directors office of Information and Privacy

SUBJECT: New Attorney General Memorandum on the FOIA

Enclosed is a new policy memorandum on the Freedom of Information Act that was issued by Attorney General John Ashcroft this past Friday evening, October 12, 2001.

As you can see, Attorney General Ashcroft's FOIA Memorandum establishes a new "sound legal basis" standard governing the defense of Freedom of Information Act lawsuits by the Department of Justice. It also recognizes the continued agency practice of making discretionary disclosures of exempt information under the Act, subject to statutory prohibitions and careful agency consideration of all institutional, commercial, and personal interests involved.

This new statement of FOIA policy supersedes the FOIA Policy statement that was issued by the Department of Justice in October 1993, and it is effective immediately. The presidential statement on the FOIA that was issued in 1993 remains in effect.

Please ensure that this new FOIA policy memorandum is distributed widely within your agency as expeditiously as possible. Additionally, we will be distributing and discussing it at a FOIA officers Conference to be held on Thursday, October 18, at the Commerce Department's Main Auditorium, at 10:00 a.m. It also is being made available through *FOIA Post* on the Department of Justice's FOIA Web site as of today.

Do not hesitate to contact OIP, through its FOIA Counselor service, at (202) 514-3642, with any question about this FOIA policy memorandum or any other aspect of FOIA administration.

Enclosure



**Office of the Attorney General**  
**Washington, D.C. 20530**

October 12, 2001

A. MEMORANDUM FOR HEADS OF ALL FEDERAL DEPARTMENTS AND AGENCIES

**FROM:** John Ashcroft  
Attorney General

**SUBJECT:** The Freedom of Information Act

As you know, the Department of Justice and this Administration are committed to full compliance with the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2000). It is only through a well-informed citizenry that the leaders of our nation remain accountable to the governed and the American people can be assured that neither fraud nor government waste is concealed.

The department of Justice and this Administration are equally committed to protecting other fundamental values that are held by our society. Among them are safeguarding our national security, enhancing the effectiveness of our law enforcement agencies, protecting sensitive business information and, not least, preserving personal privacy.

Our citizens have a strong interest as well in a government that is fully functional and efficient. Congress and the courts have long recognized that certain legal privileges ensure candid and complete agency deliberations without fear that they will be made public. Other privileges ensure that lawyers' deliberations and communications are kept private. No leader can operate effectively without confidential advice and counsel. Exemption 5 of the FOIA, 5 U.S.C. § 552(b)(5), incorporates these privileges and the sound policies underlying them.

I encourage your agency to carefully consider the protection of all such values and interests when making disclosure determinations under the FOIA. Any discretionary decision by your agency to disclose information protected under the FOIA should be made only after full and deliberate consideration of the institutional, commercial, and personal privacy interests that could be implicated by disclosure of the information.

In making these decisions, you should consult with the Department of Justice's Office of Information and Privacy when significant FOIA issues arise, as well as with our Civil Division on FOIA litigation matters. When you carefully consider FOIA requests and decide to withhold records, in whole or in part, you can be assured that the Department of Justice will defend your decisions unless they lack a sound legal basis or present an unwarranted risk of adverse impact on the ability of other agencies to protect other important records.

This memorandum supersedes the Department of Justice's FOIA Memorandum of October 4, 1993, and it likewise creates no substantive or procedural right enforceable at law.

**CHAPTER F**  
**MILITARY PERSONNEL LAW**  
**THE PRIVACY ACT**

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## **Outline of Instruction**

### **I. REFERENCES.**

#### A. Primary.

1. The Privacy Act of 1974, 5 U.S.C. § 552a, as amended.
2. Privacy Act Implementation, Office of Management and Budget, 40 Fed. Reg. 28948 (9 July 1975) as amended 40 Fed. Reg. 56741 (4 December 1975).
3. Dep't of Defense Directive No. 5400.11, Department of Defense Privacy Program (13 December 1999).
4. Dep't of Defense Regulation No. 5400.11-R, Privacy Program (31 August 1983).
5. Army Regulation No. 340-21, The Army Privacy Program (5 July 1985).
6. Dep't of Army Pamphlet 25-51, The Army Privacy Program -- System Notices and Exemption Rules (21 September 1988).

#### B. Secondary.

1. Defense Privacy Office Web Page--to research current Privacy Act System of Records Notices and other Privacy Act guidance and information-- <http://www.defenselink.mil/privacy>.
2. Defense Privacy Board Advisory Opinions Transmittal Memorandum 92-1 (18 April 1992).
3. American Civil Liberties Union Foundation, Litigation Under the Federal Freedom of Information Act and Privacy Act (20th ed. 1997), Washington, D.C. 20002.

4. Freedom of Information Act Guide and Privacy Act Overview (May 2000), an biennial Department of Justice publication (available on the World Wide Web at <http://www.usdoj.gov/foia> -- requires an Acrobat reader).
5. Websites:
  - a. Department of Justice, Office of Information and Privacy:  
<http://www.usdoj.gov/oip>
  - b. Department of Defense Privacy Office:  
<http://www.defenselink.mil/privacy/>
  - c. Army: [www.rmd.belvoir.army.mil/foiamain.htm](http://www.rmd.belvoir.army.mil/foiamain.htm) (does not contain Army systems notices – for Army systems notices use [www.defenselink.mil/privacy](http://www.defenselink.mil/privacy) and follow hyperlinks).

## **II. INTRODUCTION.**

- A. History of the Act.
- B. Congressional Concerns.
- C. Policy Objectives.
  1. Restrict Disclosure of Personal Information Maintained by Agencies.
  2. Allow Individuals Access to Records about Themselves.
  3. Allow Individuals Ability to Amend Records about Themselves.
  4. Establish Fair Collection, Maintenance and Dissemination Practices.

### III. SCOPE OF THE ACT.

- A. Generally Applicable to Agency Records within a “System of Records.” Manuel v. Veterans Administration Hospital, 857 F.2d 1112 (6th Cir. 1988).
- B. Key Definitions.
  - 1. Agency.
    - a. Privacy Act adopts the FOIA definition. § 552a(a)(1).
    - b. Government contractors and their employees are covered by the civil and criminal penalties of the Act, if provided for by the contract. § 552a(m).
  - 2. “Individual” means a citizen or alien lawfully admitted for permanent residence. § 552a(a)(2).
    - a. Deceased personnel. Crumpton v. U.S., 843 F. Supp. 751 (D.D.C. 1994), aff’d on other grounds, 59 F. 3d 1400 (D.C. Cir. 1995).
    - b. Does not include corporations or business enterprises. St. Michael’s Convalescent Hospital v. California, 643 F.2d 1369 (9th Cir. 1981).
  - 3. “Maintain” means to maintain, collect, use, or disseminate. § 552a(a)(3).
  - 4. “Record” means any item, collection, or grouping of information about an individual that is maintained by an agency including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name or other identifying characteristic. § 552a(a)(4). See Unt v. Aerospace Corp., 765 F.2d 1440 (9th Cir. 1985); see also Tobey v. NLRB, 40 F.3d 469 (D.C. Cir. 1994).
    - a. Entrepreneurial information -- Distinction between individuals and sole proprietorships. Sole proprietors are not "individuals" under the Privacy Act. See St. Michaels Convelescent Hosp.v. California, 643 F.2d 1369 (9th Cir. 1981).

- b. Personal notes - DOD Reg. 5400.7-R, para 1-402b(3); AR 25-55, para 1-402b(4). See Defense Privacy Board Advisory Opinions Transmittal Memorandum 92-1, No. 38:

Personal notes of unit leaders or office supervisors concerning subordinates ordinarily are not records within a system of records governed by the Privacy Act. The Act defines "system of records" as a "group of any records under the control of any agency...from which information is retrieved by the ...[individual's] identifying particular..." [citation omitted]...Personal notes that are *merely an extension of the author's memory*, if maintained properly, will not come under the provisions of the Privacy Act or the Freedom of Information Act [citation omitted] (emphasis added)."

To avoid being considered agency records, personal notes must meet certain requirements. *Keeping notes must be at the sole discretion of the author.* Any requirement by superior authority, whether by oral or written directive, regulation or command policy, likely would cause the notes to become official agency records. *Such notes must be restricted to the author's personal use as memory aids. Passing them to a successor or showing them to other agency personnel would cause them to become agency records* (emphasis added). Chapman v. National Aeronautics and Space Administration, 682 F.2d 525 (5th Cir. 1982).

Even if personal notes do become agency records, they will not be within a system of records and subject to the Privacy Act unless they are retrieved by the individual's name or other personal particular. Thus if they are filed only under the matter in which the subordinate acted or in a chronological record of office activities, the Privacy Act would not apply to them. However, [they] would be subject to disclosure under the FOIA.

Individuals who maintain personal notes about agency personnel should ensure their notes do not become records within systems of records. Maintaining a system of records without complying with the Privacy Act system notice requirement could subject the individual to criminal charges and a \$5,000.00 fine. [citation omitted]. See also Johnston v. Horne, 875 F.2d 1415 (9th Cir. 1989); Kalmin v. Dep't of Navy, 605 F. Supp. 1492 (D.D.C. 1985).

- c. May incorporate personal notes into agency records in a timely manner. Compare Chapman v. NASA, 682 F.2d 526 (5th Cir. 1982) with Thompson v. Dep't of Trans., 547 F. Supp. 274 (D. Fla. 1982).
- 5. A "system of records" is a group of any records under the control of an agency from which information is retrieved by the name of the individual or by some identifying particular assigned to the individual. § 552a(a)(5). Manuel v. VA, 857 F.2d 1112 (6th Cir. 1988); Crompton v. U.S., 843 F. Supp. 751 (D.D.C. 1994), aff'd on other grounds, 59 F. 3d 1400 (D.C. Cir. 1995). Henke v. United States Dep't of Commerce, 83 F.3d 1453 (D.C. Cir. 1996). (holding that the test is whether the information is actually retrieved, not retrievable, by use of the individual's name or identifier). Smith v. Henderson, 1999 U.S. Dist. LEXIS 17575 (N.D. Cal. Oct. 29, 1999) (holding postal supervisor's "never-never drawer" not subject to the Privacy Act).

#### IV. PUBLIC NOTICE OF SYSTEMS OF RECORDS.

- A. Publication Requirement (Federal Register and DA Pam 25-51).
  - 1. No longer an annual requirement.
  - 2. New or altered system. § 552a(r); AR 340-21, para 4-6.
  - Advance notice to Congress and OMB is required.
- B. Content of a system notice. § 552a(e)(4); AR 340-21, para 4-6a.
- C. Systems Notice Example:

##### **A0027-3 DAJA**

##### **System name:**

Legal Assistance Files (August 3, 1993, 58 FR 41253).

##### **System location:**

Army Legal Assistance, Office of the Judge Advocate General, Headquarters, Department of the Army, Washington, DC 20310-2200; Staff Judge Advocate offices at Army commands, installations, and activities. Official mailing addresses are published as an appendix to the Army's compilation of record system notices.

##### **Categories of individuals covered by the system:**

Active duty or retired military personnel and/or their dependents.

**Categories of records in the system:**

Individual's name, grade/rank, Social Security Number, organization, and details of problem/incident/matter on which legal assistance is sought. Records may be in the form of correspondence, memoranda, opinions of legal assistance officers, and may include interviews, summary of problems considered, advice rendered, referrals made, and documents created as a result of assistance provided.

**Authority for maintenance of the system:**

5 U.S.C. 301, Departmental Regulations.

**Purpose(s):**

To respond to inquiries and settle issues; for management and statistical reports.

**Routine uses of records maintained in the system, including categories of users and the purposes of such uses:**

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, these records or information contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

Information from this system of records may be disclosed to law students participating in a volunteer legal support program approved by the Judge Advocate General of the Army.

The 'Blanket Routine Uses' published at the beginning of the Army's compilation of systems of records notices also apply to this system.

**Policies and practices for storing, retrieving, accessing, retaining, and disposing of records in the system:****Storage:**

Paper records in file folders.

**Retrievability:**

By client's surname.

**Safeguards:**

Records are maintained in secured buildings, accessible only to designated authorized personnel who are properly instructed in the permissible use of the information.

**Retention and disposal:**

Destroyed 1 year from the closing date of the case.

**System manager(s) and address:**

Chief, Army Legal Assistance, Office of the Judge Advocate General, HQDA (DAJA-LA), Washington, DC 20310-2200; and the Staff Judge Advocates of organizations listed in the address directory published as an appendix to the Army's compilation of record system notices.

**Notification procedure:**

Individuals seeking to determine if information about themselves is contained in this record system may inquire of the Staff Judge Advocate of the installation or command where legal assistance was sought.

Individual should provide full name, Social Security Number, and any details that will assist in locating the record.

**Record access procedures:**

Individuals seeking access to records about themselves contained in this record system may inquire of the Staff Judge Advocate of the installation or command where legal assistance was sought.

Individual should provide full name, Social Security Number, and any details that will assist in locating the record.

**Contesting record procedures:**

The Army's rules for accessing records, and for contesting contents and appealing initial agency determinations are contained in Army Regulation 340-21; 32 CFR part 505; or may be obtained from the system manager.

**Record source categories:**

From the individual, his/her attorney, Army records and reports.

**Exemptions claimed for the system:** None.

## **V. COLLECTION AND MAINTENANCE OF INFORMATION.**

- A. Collect Only Relevant and Necessary Information to Accomplish an Agency Purpose as Defined by Statute or Executive Order. § 552a(e)(1); AR 340-21, para 4-1c.



B. Collect Information to Greatest Extent Practical Directly from the Individual. §552a(e)(2).

1. Collect from the Subject First when the information sought is “objective and unalterable.” Waters v. Thornburgh, 888 F.2d 870 (D.C. Cir. 1989); Dong v. Smithsonian, 943 F. Supp. 69 (D.D.C. 1996), rev'd on other grounds, 125 F.3d 877 (D.C. Cir. 1997) (holding that concerns over Plaintiff's possible reaction to an unpleasant rumor" does not excuse requirement of collection from the individual).
2. Collect from third parties when:
  - a. Verifying information (Security or Employment).
  - b. Seeking Opinion or Evaluation.
  - c. Unable to Contact Subject.
  - d. Collecting is Exceptionally Difficult (Unreasonable cost or delay).
  - e. Consent or Subject Asks for Third Party Collection.

See, AR 340-21, para 4-1d.

C. Maintain No Records Regarding How an Individual Exercises First Amendment Rights. § 552a(e)(7); AR 340-21, para 4-5.

1. Exceptions.
  - a. Authorized by statute. Hass v. United States Air Force, 848 F. Supp. 926 (D. Kan. 1994).
  - b. Consent of the subject.
  - c. Pertinent to and within the scope of an authorized law enforcement activity. Compare Jabara v. Webster, 691 F.2d 272 (6th Cir. 1982) with Clarkson v. IRS, 678 F.2d 1368 (11th Cir. 1982).

2. Applies to All records regardless of where maintained. Boyd v. Secretary of the Navy, 709 F.2d 684 (11th Cir. 1983)(holding that PA prohibition regarding collecting First Amendment information applied even when record not maintained in a system of records).

D. The Privacy Act Advisement. § 552a(e)(3); AR 340-21, para 4-2.

1. When required.
  - a. To individuals. When collecting personal information to be kept in a system of records. AR 340-21, para 4-2a.
  - b. To third party sources of information. Saunders v. Schweiker, 508 F. Supp. 305 (W.D.N.Y. 1981).
2. Content.
  - a. Authority.
  - b. Principal Purpose.
  - c. Routine uses.
  - d. Voluntary or mandatory.
  - e. Effect of not providing.
3. Location of Advisement. Defense Privacy Board Advisory Opinions Transmittal Memorandum 92-1, No. 18.

E. Accuracy Requirements.

1. Maintain records used to make determinations about an individual with such accuracy, relevance, timeliness and completeness as is reasonably necessary to assure fairness in the determination. § 552a(e)(5). Perfect records are not required; reasonableness is the standard. Doe v. United States, 821 F.2d 694 (D.C. Cir. 1987)(en banc); Edison v. Dep't of the Army, 672 F.2d 840 (11th Cir. 1982).

2. Before disseminating the record to a person other than an agency, unless disseminated pursuant to FOIA, the agency will make reasonable efforts to ensure the records are accurate, complete, timely and relevant for agency purposes. 5 U.S.C. § 552a(e)(6).

## **VI. ACCESS TO AND AMENDMENT OF RECORDS.**

A. References: §§ 552a(d)(1) and (2); AR 340-21, Ch. 2.

B. Each agency that maintains a system of records **shall**:

1. Access: “upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him . . . to review the record and have a copy made . . . .” § 552a (d)(1)
2. Amendment: “permit the individual to request amendment of a record pertaining to him . . . .” § 552a(d)(2).

C. Burdens of Proof.

1. Access. § 552a(g)(3)(A). Burden on agency with de novo review.
2. Amendment. § 552a(d)(2)(B)(i). Burden on plaintiff to prove record not accurate, relevant, timely or complete. Mervin v. FTC, 591 F.2d 821 (D.C. Cir. 1978).

D. Process and Time Limits of an Access or Amendment Request.

1. Access. 10 work days to acknowledge request. Release within 30 workdays. AR 340-21, paras. 2-2 & 2-9 (5 workdays to forward denial recommendation to AARA based on Exemption).
2. Amendment.
  - a. Custodian/System Manager: 10 workdays to acknowledge, 30 workdays to give final response. § 552a(d); AR 340-21, para 2-11.

- b. Denial/Refusal Authority: Access and Amendment Refusal Authority (AARA – 17 in Army scheme) AR 340-21, para 1-7. No specified time limit.
- c. Appeal:
  - (1) Requester – 60 calendar days to appeal.
  - (2) Review Authority: DA Privacy Review Board w/ OGC concurrence. 30 workdays (30 more for “good cause”) AR 340-21, para 2-11h.

E. Access Issues.

- 1. Third party information in the subject/requester's file.
  - a. Definition of a “record.” Is the information "about" the requester?
  - b. If not, see Voelker v. IRS, 646 F.2d 332 (8th Cir. 1981); compare DePlanche v. Califano, 549 F. Supp 685 (W.D. Mich. 1982).
- 2. Medical records of minors. DOD Reg. 5400.11-R, ch. 3, para 6e; see also AR 40-66, chapter 2.
  - a. The Privacy Act applies to "[citizens] of the United States or [aliens] lawfully admitted for permanent residence." Minors are protected by the Act because minority is not a disqualifier. § 552a(a)(2), see also Defense Privacy Board Advisory Opinions Transmittal Memorandum 92-1, No. 9.
  - b. The Privacy Act provides that "the parent of any minor...may act on behalf of the individual." § 552a(h).
  - c. Stateside.
    - (1) Definition of minor? State law.

- (2) If a minor, may release records to parents unless prohibited by state law. AR 40-66, para 2-5(a)(1); DA Pam 340-6, No. 27.
- (3) Look to the law of the state in which the records are located--the states differ on the question of access to a minor's medical records based, in part, on subject matter (e.g., psychiatric records, treatment records for drug and alcohol abuse, sexual hygiene/reproductive records).

d. Overseas.

- (1) Definition of minor? The Army deems the age of majority to be 18 years. DA Pam 340-6, No. 45.
- (2) Parental access. Parents have a general right of access to medical records of minors.
- (3) Parents may be denied access only if **all** of the following four conditions are met:
  - (a) Minor was between ages 15 and 17 at the time of treatment.
  - (b) Treatment sought in program that promised to keep treatment records confidential.
  - (c) Minor specifically requested confidentiality.
  - (d) Parent did not have the minor's written authorization or a court order.

3. Access denied under PA, but accessible under FOIA.

- a. PA is not a FOIA exemption 3 withholding statute. Provenzano v. DOJ, 717 F.2d 799 (3d Cir. 1983), vacated as moot, 469 U.S. 14 (1984).

- b. Clarified by Legislation. CIA Information Act, Pub. L. No. 98-477, § 2(c), 98 Stat. 2211, 2212 (1984) (codified at 5 U.S.C. § 552a(t)(2)).

F. Amendment Issues.

1. No Collateral Attack.

- a. Issues already the subject of judicial or quasi-judicial action. Spurge v. Derwinski, 26 F. 3d 8 (2d Cir. 1994).
- b. Issues for which adequate judicial review is available. Henderson v. Social Security Administration, 908 F.2d 559 (10th Cir. 1990).
- c. Exhaustion of administrative remedies. Cargill v. Marsh, 902 F.2d 1006 (D.C. Cir. 1990)

2. Facts v. Judgment.

- a. May only correct facts, not judgments, under the Act. AR 340-21, para 2-10a; Defense Privacy Board Advisory Opinions Transmittal Memorandum 92-1, No. 4; Hewitt v. Grabicki, 794 F.2d 1373 (9th Cir. 1986).
- b. Can amend judgments only if all underlying facts are discredited. RR v. Dep't of Army, 482 F. Supp. 770 (D.D.C. 1980) (dictum).

## VII. TEN EXEMPTIONS.

A. Exemptions Deny a Subject Access to His Own Records.

B. Claiming Exemptions.

- 1. Exemptions are not automatic.
- 2. Agencies are not entitled to improperly claimed exemptions. Ryan v. Dep't of Justice, 595 F.2d 954 (4th Cir. 1979).

C. Two General Exemptions. § 552a(j)(1)-(2).

1. What records are exempt?
  - a. Maintained by the CIA. § 552a (j)(1).
  - b. Maintained by an agency/component thereof which performs as its principal function any activity pertaining to law enforcement.  
§ 552a (j)(2)
2. According to the Defense Privacy Board, the exemption does not follow the record. Defense Privacy Board Advisory Opinions Transmittal Memorandum 92-1, No. 31. But see Doe v. FBI, 936 F.2d 1346 (D.C. Cir. 1991).

D. Seven Specific Exemptions. § 552a(k)(1)-(7).

1. What records are exempt?
  - a. Classified information (simply incorporates FOIA exemption 1 protections in the Privacy Act context).
  - b. Investigatory material compiled for law enforcement purposes not covered by § 552a(j)(2).
  - c. Protective services to the President.
  - d. Statistical records.
  - e. Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts or access to classified material. Limited to the protection of a confidential source who provided the information pursuant to an express promise of confidentiality.

- (1) Also includes material compiled to determine whether a federal grant will be awarded. Henke v. United States Dep't of Commerce, 83 F.3d 1445 (D.C. Cir. 1996).
    - (2) Applicable even though the source of the confidential information is known to the requester. Volz v. Dep't of Justice, 619 F.2d 49 (10th Cir.).
  - f. Testing or examination material used solely to determine individual qualifications for appointment/ promotion in Federal service.
  - g. Evaluation material used to determine potential for promotion in the armed services. Limited to the protection of a confidential source. May v. Dep't of Air Force, 777 F.2d 1012 (5th Cir. 1985).
- E. One Special Exemption. § 552a(d)(5).
  - 1. Information compiled in reasonable anticipation of civil litigation.
  - 2. Self-executing.
  - 3. Applies to administrative proceedings. Martin v. Office of Special Counsel, 819 F.2d 1181 (D.C. Cir. 1987); Defense Privacy Board Advisory Opinions Transmittal Memorandum 92-1, No. 27.

## VIII. DISCLOSURE OF INFORMATION FROM SYSTEMS OF RECORDS

- A. Disclosure Prohibited. The "no disclosure without consent" rule:  
"No agency shall disclose any record . . . except pursuant to a written request by or with the prior written consent of the individual to whom the records pertains, unless an exception applies."
  - 1. Disclosure must be from a system of records.
    - a. Pertains to information initially retrieved from a system of records. Boyd v. Secretary of the Navy, 709 F.2d 684 (11th Cir. 1983).



- b. Personal opinion or knowledge from memory not from a system of records. Kline v. HHS, 927 F.2d 522 (10th Cir. 1983) (holding that verbal information about employee derived from independent knowledge and not from an agency system of records are not subject to the Privacy Act.).
  - 2. A later release of information previously known does not violate the Privacy Act. Hollis v. Department of the Army, 856 F.2d 1541 (D.C. Cir. 1988). (holding that when a release of servicemember's child care allotments consisted merely of information . . . which the recipient of the release already knew, the Privacy Act is not violated"); FDIC v. Dye, 642 F.2d 833 (5th Cir. 1981). But see Pilon v. Department of Justice, 73 F.3d 1111 (D.C. Cir. 1996) (holding that faxing a PA protected document to a person with familiarity of its existence does not remove it from PA protection).
  - 3. Privacy Act is not limited to extra-judicial disclosures; it applies even where a disclosure to a court during the course of litigation is undertaken. See Laningham v. Navy, 813 F.2d 1236 (D.C. Cir. 1987) (per curium) (holding that Navy did not intentionally and willfully disclose disability board information in civil trial in violation of PA).
- B. 12 Exceptions to the "no disclosure without consent" rule permit access to information without prior written consent of the subject of the record. § 552a(b)(1)-(12).
  - 1. Exception 1. Disclosure within the agency (DOD) to those having a need to know the information in performing their duties.
    - a. Contractors who operate a system of records to accomplish an agency mission are considered part of an agency. See Coakley v. Department of Transportation, No. 93-1420 (D.D.C. Apr. 7, 1994); Defense Privacy Board Advisory Opinions Transmittal Memorandum 92-1, No. 16; But see Taylor v. Orr, (D.D.C. Dec. 5, 1983).
    - b. Lists of nonparticipants/nonmembers.

- (1) Savings bond programs. Parks v. IRS, 618 F.2d 677 (10th Cir. 1980); Defense Privacy Board Advisory Opinions Transmittal Memorandum 92-1, No. 37.
- (2) Officers' Clubs.
- (3) AUSA.

2. Exception 2. Disclosure required by FOIA.

a. FOIA and Privacy Act interface.

- (1) FOIA Exemption 6: Protection of Personal Privacy.
- (2) FOIA Exemption 7(C): Records or Information Compiled for Law Enforcement Purpose.

b. The balancing test. Department of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749 (1989).

-- Public Interests in Disclosure v. Invasion of Privacy.

c. Specific applications of the balancing test.

- (1) Some information normally is releasable:
- (2) Most interests will not outweigh the invasion of personal privacy.

d. No discretionary release.

- (1) No agency "discretionary disclosure" of information that is exempt under FOIA and subject to the Privacy Act. DOD v. FLRA, 510 U.S. 487 (1994).

- (2) Agency must have an actual FOIA request to rely on exception 2. OMB Memorandum for the Senior Agency Officials for Information Resources Management, SUBJECT: Privacy Act Guidance - Update, dtd 24 May 1985; Compare Bartel v. FAA, 725 F.2d 1403 (D.C. Cir. 1984) with Cochran v. United States, 770 F.2d 949 (11th Cir. 1985).
  - e. Categorical Balancing Requiring Release. Military personnel information, such as: name, rank, gross salary, duty assignments, duty telephone, etc., may be released. AR 340-21, para 3-3.
3. Exception 3. Disclosure for routine use.
- a. Specific routine uses as listed in systems notices, DA Pam 25-51. CAUTION: Printed systems notices are often out of date. Use on-line sources for most current systems notices.
  - b. Compatibility requirement. Disclosure of record must have compatible purpose for which it was collected. § 552a(a)(7). Britt v. Naval Investigative Service, 886 F.2d 544 (3rd Cir. 1989) (holding that transfer of Marine Reservist's military criminal investigation file did not meet PA compatibility requirement); Swenson v. United States Postal Service, 890 F.2d 1075 (9th Cir. 1989).
  - c. General/blanket routine uses. AR 340-21, para 3-2. These include:
    - (1) To law enforcement agencies when record indicates a violation or potential violation of law.
    - (2) To other federal agencies on request for hiring, retention, security clearance, or licensing decisions by those agencies.
    - (3) Congressional inquiries and private relief legislation. Pellerin v. VA, 790 F.2d 1553 (11th Cir. 1986). But see Swenson v. United States Postal Service, 890 F.2d 1075 (9th Cir. 1989) (disclosure beyond scope of inquiry).

- (4) Required by international agreement.
  - (5) To DOJ for litigation.
  - (6) Counter-intelligence purposes or enforcing laws which protect the national security.
- 4. Exception 4. Bureau of Census.
- 5. Exception 5. Statistical research.
- 6. Exception 6. National Archives.
- 7. Exception 7. Law enforcement. Disclosure may be made without the consent of the subject of a record in response to the request of a law enforcement agency. The request must be submitted in writing form the head of the agency.
- 8. Exception 8. Compelling circumstances affecting health or safety of the individual.
  - a. Case law emphasizes emergency nature of exception.
  - b. Disclosure notification must be sent to last known address.
  - c. Individual about whom records are disclosed need not necessarily be the individual whose health or safety is at peril; e.g., release of records on several individuals in order to identify an individual who was injured in an accident. See OMB's Privacy Act Guidelines, 40 Fed. Reg. 28,955 (1975); DePlanche v. Califano, 549 F. Supp. 685, 693-98 (W.D. Mich. 1982).
- 9. Exception 9. Congress. Disclosure may be made to "either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee [thereof]."
- 10. Exception 10. Comptroller General.

11. Exception 11. Pursuant to the order of a court of competent jurisdiction.

12. Exception 12. Credit reporting agencies.

C. Accounting for Disclosure. § 552a(c).

1. Disclosure accounting is required unless the record is disclosed within the agency (Exception 1) or pursuant to FOIA (Exception 2). AR 340-21, para 3-4.

2. Accounting must include the date, nature, and purpose of disclosure and the name and address of the recipient.

3. Uses of Disclosure Accounting Record (DA Form 4410-R).

## **IX. SOCIAL SECURITY NUMBERS.**

A. Section 7(a)(1). (Enacted as part of the Privacy Act, but not codified.). No Federal, State, or Local Governmental Agency can Deny a Right, Privilege or Benefit Because of Refusal to Disclose Social Security Account Number, unless

1. Required by Federal statute, or

2. Disclosure was required under any Federal, state, or local statute or regulation in existence and operating before 1 January 1975 to verify the identity of the individual.

B. Requests by agency for SSN requires informing whether disclosure is mandatory or voluntary, the statutory authority, and what use will be made of it. Sec. 7(b).

## **X. CRIMINAL PENALTIES.**

A. Knowingly/Willfully Making Prohibited Disclosure. See, e.g., United States v. Trabert, 978 F.Supp 1368 (D.Colo. 1997)

- B. Willfully Maintaining a System of Records Without Complying with Notice Requirements.
- C. Knowingly/Willfully Requesting/Obtaining Information Under False Pretenses.
- D. Action is against the individual and not the agency.

## **XI. CIVIL REMEDIES.**

- A. Statutory. § 552a(g).

<b><u>VIOLATION</u></b>	<b><u>REMEDY</u></b>
Wrongful refusal to amend. § 552a(g)(1)(A). § 552a(g)(2).	Enjoin/order amendment; attorney fees/costs.
Wrongful denial of access. § 552a(g)(1)(B)	Enjoin from withholding; provide <u>in camera</u> inspection; attorney fees/costs. § 552a(g)(3).
Failure to maintain accurate, timely, complete, and relevant records resulting in an adverse determination. § 552a(g)(1)(C).	If agency acted in an intentional/willful manner, U.S. is liable for: <ul style="list-style-type: none"> <li>a) Actual damages but not less than \$1,000.</li> <li>b) Attorney fees and costs. § 552a(g)(4).</li> </ul>
Failure to comply with another provision causing an adverse effect. § 552a(g)(1)(D).	If agency acted in an intentional/willful manner, U.S. liable for: <ul style="list-style-type: none"> <li>a) Actual damages but not less than \$1,000.</li> <li>b) Attorney fees/costs. § 552a(g)(4).</li> </ul>

1. Civil remedies are solely against the agency. Recent case applies Feres Doctrine rationale to servicemember civil suits – barring such suits. Cummings v. Dep't of Navy, 116 F.Supp. 2d 76, 81-84 (D.D.C. 2000)(holding former Navy fighter pilot can not maintain suit against the Navy under privacy Act for wrongful release of her flight school evaluations).

2. Courts are not free to create remedies greater than those granted by the statute. Edison v. Dep't of Army, 672 F.2d 840 (11th Cir. 1982).
3. Intentional/willful refers to the intentional or willful failure to abide by the Act. Andrews v. VA, 838 F.2d 418 (10th Cir. 1988); Tijerina v. Walters, 821 F.2d 789 (D.C. Cir. 1987); Albright v. U.S., 732 F.2d 181 (D.C. Cir. 1984).
4. Privacy Act does not mandate agency to create and maintain files, and destruction of an official record does not give right to a Privacy Act cause of action. Tufts v. Dep't of Air Force, 793 F.2d 259 (10th Cir. 1986).
5. Damages. Cummings v. Dep't of the Navy, 116 F. Supp. 2d 76 (D.D.C. Sept. 6, 2000)(holding that former Navy pilot was barred from PA damages suit based on Feres Doctrine rationale); Alexander v. FBI, et al., 193 F.R.D. 1 (D.D.C. March 29, 2000)(compelling further discovery regarding "Filegate" letters in PA suit for damages against the Executive Office of the President); Tripp v. Executive Office Of The President, et al., 104 F. Supp. 2d 30 (D.D.C. June 14, 2000) (denying motion to recuse in PA damages suit against EOP and DoD).
6. Attorney's Fees.
  - a. Purpose of granting attorney fees. Anderson v. Dep't of Treasury, 648 F.2d 1 (D.C. Cir. 1979).
  - b. Threshold requirement: plaintiff must substantially prevail. Sweatt v. U.S. Navy, 683 F.2d 420 (D.C. Cir. 1982).
  - c. Factors considered in granting this discretionary remedy. Barrett v. Bureau of Customs, 651 F.2d 1087 (5th Cir. 1981).
  - d. Only permitted for litigation; not administrative actions. Kennedy v. Andrus, 459 F. Supp. 240 (D.D.C. 1978), aff'd, 612 F. 2d 586 (D.C. Cir. 1980)(table cite).
  - e. Not paid to a pro se litigant even if plaintiff is an attorney. Manos v. Department of the Air Force, 829 F. Supp. 1191 (N.D. Cal. 1993).

7. Two-year statute of limitations governs Privacy Act actions. § 552a(g)(5). Bower v. Department of Air Force, 875 F.2d 632 (7th Cir. 1989); Tijerina v. Walters, 821 F.2d 789 (D.C. Cir. 1987).

B. Constitutional Tort. Perry v. FBI, 759 F.2d 1271 (7th Cir. 1985).

- a. The Privacy Act is not intended as an exclusive remedy.
- b. Recording and disseminating derogatory information without notice and the opportunity to refute may amount to a violation of due process guaranteed by the Fifth Amendment.
- c. Individual defendants are subject to qualified immunity and personal liability. Note that liability is limited by Chappell v. Wallace, 462 U.S. 296 (1983), and Bush v. Lucas, 462 U.S. 367 (1983).

## **XII. CONCLUSION.**



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**Chapter G**  
Law of Military Installations  
**STANDARDS OF CONDUCT**

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## Outline of Instruction

### I. REFERENCES.

- A. Executive Order 12674, "Principles of Ethical Conduct for Government Officers and Employees," April 12, 1989, as amended.
- B. Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. 2635 (Office of Government Ethics Rules).
- C. DOD 5500.7-R, JOINT ETHICS REGULATION (JER), 30 Aug 93. Change 4, effective 6 August 1998. Note: Recent Changes marked with an asterisk (\*).

### II. BASIC OBLIGATIONS OF PUBLIC SERVICE UNDER EXECUTIVE ORDER 12674 (also reproduced on the last page of this outline).

1. **Public Service is a public trust**, requiring employees to place loyalty to the Constitution, the laws and ethical principles above private gain.

2. Employees **shall not hold financial interests that conflict with the conscientious performance of duty**.

3. Employees **shall not engage in financial transactions using nonpublic Government information** or allow the improper use of such information to further any private interest.

4. An employee **shall not**, except as [provided for by regulation], **solicit or accept any gift or other item of monetary value** from any person or entity seeking official action from, doing business with, or conducting activities regulated by the employee's agency, or whose interests may be substantially affected by the performance or nonperformance of the employee's duties.

5. Employees **shall put forth honest effort in the performance of their duties**.

6. Employees **shall not knowingly make unauthorized commitments** or promises of any kind purporting to bind the Government.

7. Employees **shall not use public office for private gain**.

8. Employees **shall act impartially and not give preferential treatment** to any private organization or individual.

9. Employees **shall protect and conserve Federal property** and shall not use it for other than authorized activities.

10. Employees **shall not engage in outside employment or activities**, including seeking or negotiating for employment, **that conflict with official Government duties** and responsibilities.

11. Employees **shall disclose waste, fraud, abuse, and corruption** to appropriate authorities.

12. Employees **shall satisfy in good faith their obligations as citizens**, including all just financial obligations, especially those--such as Federal, State, or local taxes--that are imposed by law.

13. Employees **shall adhere to all laws and regulations that provide equal opportunity for all Americans** regardless of race, color, religion, sex, national origin, age, or handicap.

14. Employees **shall endeavor to avoid any actions creating the appearance** that they are violating the law or ethical standards. Whether particular circumstances create an appearance that the law or these standards have been violated shall be determined from the perspective of a reasonable person with knowledge of the relevant facts.

### III. JOINT ETHICS REGULATION (JER).

- A. Overview. A single, comprehensive regulation covering more than traditional standards of conduct.
- B. Applies OGE rules to DoD. Specifically applies many of the OGE rules to enlisted members. Rules printed in ***bold italics*** are general orders--they apply to all military members without further implementation and violations may be punishable as violations of a lawful general order, Article 92, UCMJ.
- C. Rescinds Army-specific Standards of Conduct rules once found in AR 600-50, Standards of Conduct. Now all services use the same rules.
- D. Key definitions under the JER
  - 1. DOD Employee (JER 1-211). The JER applies the Executive Branch Standards of Conduct rules to "DoD Employees." The definition essentially includes everyone in DoD:
    - a. Any DOD civilian officer or employee (including special Government employees) of any DOD Component (including any nonappropriated fund activity).
    - b. Any active duty Regular or Reserve military officer, including warrant officers.
    - c. Any active duty enlisted member of the Army, Navy, Air Force, or Marine Corps.
    - d. Any Reserve or National Guard member on active duty under orders issued pursuant to title 10, United States Code.

- e. Any Reserve or National Guard member while performing official duties or functions under the authority of either title 10 or 32, United States Code, or while engaged in any activity related to the performance of such duties or functions, including any time the member uses his Reserve or National Guard of the United States title or position, or any authority derived therefrom. [Changed from a status to an action analysis.]
- 2. Designated Agency Ethics Official (DAEO) (JER 1-209): A DOD employee who is responsible for the implementation and administration of the component's ethics program.
- 3. Ethics Counselor (EC) (JER 1-214): A DOD employee appointed in writing to generally assist in implementing and administering the command's or organization's ethics program and to provide ethics advice to DOD employees in accordance with the JER.
  - a. Communications to an EC are not protected by any attorney-client privilege while communications received in a legal assistance capacity usually are. Attorneys who serve as ECs must advise individuals being counseled as to the status of that privilege prior to any communications.
  - b. ECs advise and assist on issues, such as:
    - (1) acceptance of gifts and gratuities;
    - (2) business visitors (e.g., product demonstrations and capabilities briefings);
    - (3) ethics training;
    - (4) participation in or dealings with private and professional associations, such as AUSA;
    - (5) review of public (SF 278) and confidential (OGE 450) financial disclosure reports, and resolving conflicts of interests;
    - (6) post-Government employment restrictions; and

(7) use of Government resources and time.

c. EC's advice *generally* precludes disciplinary action against an employee who follows EC's advice (5 C.F.R. § 2635.107(b)).

4. Agency Designee (JER 1-202): The first supervisor who is a commissioned military officer or a civilian above GS/GM-11 in the chain of command or supervision of the DOD employee concerned. Except in remote locations, the Agency Designee may act only after consultation with his local Ethics Counselor. For any military officer in grade 0-7 or above who is in command and any civilian Presidential appointee confirmed by the Senate, the Agency Designee is his Ethics Counselor.

#### **IV. USE OF GOVERNMENT RESOURCES.**

A. Official Use. Punitive provision, restricting use of communication systems (telephones, facsimile machines, electronic mail, internet systems, etc.) for official uses only - with exceptions. (JER 2-301). Official use may include deployed employee's use to enhance MWR. This requires theater commander approval.

B. Permits Agency Designee to authorize personal (non-official) use, only IF:

1. there is no adverse effect on duty performance;
2. the duration and frequency are reasonable (if possible while off duty - during breaks or after normal work hours);
3. a legitimate public interest is served (keeping employees at their desks; education/familiarization with communication systems; enhancing professional skills; job search in response to downsizing);
4. use does not reflect adversely on DOD (no pornography, chain letters, advertising, soliciting, or selling (unless on authorized bulletin boards), etc.);
5. use does not overburden Government communication systems; and

6. use creates no significant additional cost to DOD (no long distance charges to the Government).
- C. Monitoring Use. Employees' use serves as consent to monitoring of any type of use, including incidental and personal uses, whether authorized or not.
- D. Other Use. Agency Designees may permit employees limited use of items, such as typewriters, calculators, libraries, and other similar resources and facilities, if:
1. use does not reflect adversely on duty performance;
  2. use is of reasonable duration and made during personal time;
  3. use serves a legitimate public interest (supports local charities or community volunteers, enhances professional skills, or job search relative to downsizing, etc.);
  4. use does not reflect adversely on DOD; and
  5. use creates no significant additional DOD cost.
- E. Employee Support. Employees (such as secretaries, clerks, and military aids) may not be used to support the unofficial activity of another DOD employee in support of non-Federal entities. (JER 3-305).

## **V. GIFTS, A PRACTICAL APPROACH (JER, CHAPTER 2).**

- A. Critical Question: Who is giving the gift? Three potential sources for gifts. Each source has its own analysis.
1. Outside Source.
  2. Foreign Government.



3. Fellow government employee.

B. Gifts from Outside Sources (JER, chapter 2).

1. Basic Punitive Prohibition on Gifts From Outside Sources. A soldier shall not **solicit** or accept, directly or indirectly, a gift:
  2. from a prohibited source (e.g., someone who has an interest in the performance of official Army missions); or
  3. given because of the employee's official position.

C. Gift from Outside Source Analysis, a practical approach:

1. Preliminary Question: Is the item actually a gift? The term "gift" includes almost anything of monetary value, but not these (*exemptions*):
  - a. Coffee, donuts, and similar modest items of food and refreshments when offered other than as part of a meal;
  - b. Greeting cards and most plaques, certificates, and trophies;
  - c. Rewards and prizes in contests open to the public;
  - d. Commercial discounts available to the general public or to all Government or military personnel;
  - e. Commercial loans, and pensions and similar benefits;
  - f. Anything paid for by the Government, secured by the Government under Government contract, or accepted by the Government in accordance with a statute; and
  - g. Anything for which the employee pays market value.
2. If the item is a gift, does an exception apply? Common *exceptions* when an employee may accept:

- a. unsolicited gifts with a market value of \$20 or less per source, per occasion, so long as the total value of all gifts received from a single source during a year does not exceed \$50;
- b. gifts based on an outside relationship, such as a family relationship or personal friendship;
- c. discounts and similar benefits offered to groups in which membership is not related to Government employment (or "Government discounts" where the same offer is broadly available to the public through similar groups), and certain benefits offered by professional associations or by persons who are not prohibited sources;
- d. legitimate awards that are part of a regular and established program of recognition for meritorious public service;
- e. gifts resulting from the outside business activities of employees and their spouses;
- f. free attendance (not travel or lodging) paid by the sponsor of a widely-attended gathering, speaking engagement, or other event if the agency determines an interest in the event (attend in personal capacity) [Rule amended: 61 Fed. Reg. 42965 (20 Aug 96) allows payment by other than the sponsor if >100 people attend and the cost is <\$250; also allows spouse or other guest to attend];
- g. food, refreshments, and entertainment at certain social events extended by persons who are not prohibited sources, where no one is charged a fee to attend the event;
- h. unsolicited gifts of free attendance for DOD employees (and spouses) at events sponsored by state or local governments or non-profit, tax exempt civic organizations, where the agency has determined its community relations interests in the event (JER 2-202a); and
- i. certain educational scholarships or grants for DOD employees and dependents (JER 2-202b).

3. Would using the exception undermine Government integrity? Even if a gift is covered by one of the exceptions, do not accept it if it will undermine Government integrity.
  - a. Cannot use official position to solicit a gift or force someone to give a gift.
  - b. Any gift is illegal if it is in exchange for an official action.
  - c. Some gifts may be prohibited by other statutes (such as procurement integrity contract laws).
  - d. Finally, gifts may not be accepted so frequently that anyone would question whether influence is being bought. For example, a Federal building manager cannot accept a free sandwich every week from a lunch counter operating in the building.

D. Handling Improper Gifts (5 C.F.R. § 2635.205). When an employee cannot accept a gift:

1. First and foremost, if possible, refuse the offer of an improper gift. Diplomatically explain that Federal employees may not accept certain gifts.
2. The employee should pay the donor its market value; or
3. If the gift is a tangible item, the employee may instead return the gift.
4. Subject to approval, perishable items may be donated to a charity, shared within the office, or destroyed.

**VI. FOREIGN GIFTS. (U.S. CONST. ART. I, § 9, CL. 8; 5 U.S.C.A. § 7342, AND JER § 2-300.)**

A. Gifts from foreign governments.

1. Can accept a "gift of minimal value" (i.e., one having a retail value in the United States not in excess of \$260 at the time of acceptance. "Minimal value," based on the Consumer Price Index.)
  2. Gifts valued above "minimal value" can only be accepted on behalf of the U.S. Report to and deposit these with Commander, PERSCOM, ATTN: TAPC-PDO-IP, Alexandria, VA, 22332-0474 for disposal, official use, or forwarding to the General Services Administration.
  3. Aggregate the value of gifts from different officials during the same presentation.
  4. Gifts from spouses of foreign officials are deemed gifts from the foreign official.
  5. Gifts to employees' spouses are deemed gifts to the employee.
  6. Gifts received at separate presentations are separate gifts - their values are not aggregated (even if from the same official and on the same day).
  7. When more than one gift is given at a single presentation, the employee may retain only those with an aggregate of less than "minimum value." The remainder (valued over "minimal value") may not be kept by the employee.
- B. Gifts to deployed personnel. Apply general gift analysis, unless gift is from a foreign government, then apply those rules.

## **VII. GIFTS BETWEEN EMPLOYEES (JER, CHAPTER 2).**

- A. General Punitive Rules. An employee shall not:
1. give a gift or solicit a contribution for a gift for an official superior (i.e., supervisor or those in supervisory chain); or

2. accept a gift from a lower-paid employee, unless the donor and recipient are personal friends who are not in a superior-subordinate relationship.

B. Exceptions.

1. Gifts may be given on an occasional basis, including traditional gift-giving occasions, such as birthdays and holidays.
  - a. This includes minor contributions of food which will be consumed at the office, meals at someone's home (of a type and value customarily provided to personal friends), and customary gifts, such as a bottle of wine brought when invited to another's home.
  - b. This also includes infrequent gifts having a value of less than \$10 on appropriate occasions, such as Christmas or birthdays. Such gifts may not become "routine."
2. A subordinate may give or donate toward a gift to a superior on special infrequent occasions, such as, marriage PCS, or retirement.
  - a. Gifts on special infrequent occasions that do not terminate the superior subordinate relationship are limited to \$300 in value per gift per donating group (JER 2-203).
    - (1) Donating group is comprised of all contributors to that group gift.
    - (2) If one contributor contributes to two donating groups, then value of gifts from groups with a common contributor is aggregated as if from a single donating group--\$300 limit applies to total value (JER 2-203a(2)).
  - b. Special infrequent occasion gifts that terminate the superior, subordinate relationship (retirement, resignation, transfer) may exceed \$300 per donating group if they are appropriate to the occasion and are uniquely linked to the departing employee's position or tour of duty and commemorate the same. (Changed on 2 January 1997.)

- c. An employee cannot solicit more than \$10 from another employee for a group gift to the contributing employee's superior (JER 2-203b).
- d. Solicitations for gifts to a superior must be completely voluntary. Solicited individual may decline to contribute.
- e. To avoid improper pressure, the collection should be handled by someone junior in the organization.

## **VIII. OFFICIAL TRAVEL.**

### **A. Air Travel.**

- 1. First class. On official business, use coach, unless:
  - a. No other reasonably available accommodations exist.
  - b. Travel by an employee whose physical condition necessitates first-class travel.
  - c. Exceptional security circumstances.
- 2. Report all *purchased* first-class travel to GSA within 60 days of the end of each fiscal year.
- 3. Premium class (other than first class, such as business class) may be used, **if**:
  - a. Regularly scheduled flights along the required route only provide premium-class seats.
  - b. No space is available in coach, and travel is urgent and cannot be postponed.

- c. Travel involves an employee with a disability substantiated in writing by competent medical authority. An attendant may accompany him in premium class, if necessary.
- d. Security purposes or exceptional circumstances exist.
- e. Travel on a foreign flag carrier has been approved and the sanitation or health standards in coach are inadequate.
- f. Overall savings to the Government would result, such as avoidance of additional subsistence costs, overtime, or lost productive time incurred while waiting for available coach seats.
- g. Travel costs are paid by a non-Federal source. Payments from a non-Federal source may not be used for first-class travel, only coach or premium-class.
- h. Travel which is in excess of 14 hours and begins/ends in a foreign country is now only authorized premium upgrade in limited circumstances.

B. Payment for **Official** Travel Expenses From Non-Federal Sources (31 U.S.C. § 1353; JER 4-101; JFTR, Chapter 7, Part W, §§ U7900-7908; JTR, Chapter 4, Part Q, §§ C4900-4908; HQDA Letter 55-96-1, Subject: Acceptance of Payments From a Non-Federal Source for Official Travel Expenses (30 October 1996); 41 C.F.R. Part 304).

- 1. Gift requiring approval of normal travel approving official.
- 2. Unsolicited gift may be accepted under 31 U.S.C. § 1353. Consultation with Ethics Counselor required. Payment may be accepted for travel, subsistence, and related expenses.
- 3. Deciding official must determine acceptance does not appear to jeopardize integrity of agency. Standard: reasonable person with knowledge of relevant facts. Deciding official considers (31 C.F.R. Part 304):
  - a. Source of offer/payment;
  - b. Purpose of meeting or similar function;

- c. Identity of other expected participants;
  - d. Nature and sensitivity of any matter pending at agency affecting the offeror;
  - e. Significance of traveler's role in any offeror's pending matter; and
  - f. Monetary value and character of travel benefits offered.
- 4. After travel, traveler reports acceptance if over \$250 through the approval authority and the local Ethics Counselor to DAJA-SC.
  - 5. Payments from a non-Federal source may not be used for first-class travel, only coach or premium class less than first class (JFTR, §§ U7902D, U3125 (7/1/94), JTR; §§ C4902.4, C2205).

**IX. INCIDENTAL TRAVEL BENEFITS (JER, CHAPTER 4, SECTION 2; JFTR §§ U3125 AND U2010; JTR § C2205; AND APRIL 1999 SECARMY TRAVEL POLICY).**

- A. Federal Government Property. Anything that a DOD employee receives as a result of official travel belongs to the Federal Government unless it falls under a gift exception (5 C.F.R. Part 2635, Subpart B, and JER chapter 2).
  - 1. Frequent Traveler Benefits (JER 4-201). (Change due at time of printing this outline. Updated information to be distributed in class.)
  - 2. Awards and prizes (merchandise) from travel services on official travel belong to the Federal Government.
- B. Personal Property. Benefits that can't be used for official purposes may be accepted if a gift exception (5 C.F.R. Part 2635, Subpart B, and JER chapter 2) applies.
  - 1. On-the-spot upgrades (JER 4-202). May be accepted if they meet the gift exceptions.



- a. May accept if generally available to the public, all Federal employees, or all military members.
  - b. Do not accept if offered because of traveler's rank or official position.
  - c. Upgrades while traveling in uniform--OK to accept, unless it is given because of your official position, however, Army employees may not travel in premium or higher class in uniform.
2. Cash or credit rebates from personal credit cards used on official travel are not the property of the Federal Government and may be accepted (Comp. Gen. Decision B-236219, Matter: Use of Discover Charge Cards, May 4, 1990).
3. Getting "bumped" on official travel.
- a. Benefits, such as free tickets, as a result of being involuntarily bumped from an overbooked flight on official travel belong to the Government (traveler remains on Government time).
  - b. Benefits as a result of voluntarily relinquishing a seat on an overbooked flight belong to the traveler and can be used on personal travel. The traveler is on his own time and may not give up the seat if it would interfere with mission accomplishment.

**X. TRANSPORTATION. (SEE SECARMY MEMO, POLICY FOR TRAVEL BY DA OFFICIALS (NOVEMBER 2002))**

A. Domicile-to-Duty Transportation.

1. Generally not allowed.
  - a. Designated position exception:
    - (1) Field work (i.e., duty requires employee to travel to various other duty sites from primary duty location, e.g., recruiter).
    - (2) Intelligence, counterintelligence, protective services, or criminal law enforcement duties.
  - b. Statutory exception: special determinations based on clear and present danger, emergency, or compelling operational considerations.
2. Service Secretaries may approve in limited circumstances.

B. Spouse Transportation.

1. General rule: spouses do not accompany soldiers-sponsor on official business at Government expense.
2. Exceptions:
  - a. Invitational travel orders for "unquestionable official participation" requirement. Spouse must actually participate or presence is deemed in national interest because of diplomatic or public relations. Transportation only (no per diem).
  - b. "Non spouse" travel where spouse is conferring with DOD officials on DOD matters (e.g., substantive spouse agenda).

3. Nontactical vehicles. Space available with sponsor when vehicle used to transport Army personnel to an official function and the transportation of the spouse does not result in additional expense.

## **XI. JER CHANGES NOT COVERED ABOVE.**

### **A. Financial Disclosure Reporting.**

1. Threshold Filing Increase. JER 7-300b increases the presumptive threshold for required OGE 450 filing to \$2,500 per purchase and \$20,000 per year. This conforms the JER to the definition of "micro purchases" in the Federal Acquisition Streamlining Act.
2. \* Forms. OGE Form 450 in; SF 450 out. OGE Optional Form 450A, Confidential Certificate of No New Interests, authorized, but must use DoD version of the form and attach copy of last SF 450.

### **B. Annual Ethics Training. (JER 11-302)**

1. Annual ethics training may now be presented in person by a Qualified Individual or by telecommunications, computer-based methods, or by recorded means prepared by a qualified Individual.
2. If the DAEO determines, SGEs and RC personnel serving on AD less than 30 consecutive days may be trained by "other means."

- C. 18 U.S.C. § 208 Regulations (Conflict of Interest) 5 C.F.R. Part 2640.101 (JER 5-200). Supersedes TAB D of JER superseded.

## **XII. CONCLUSION.**

# PERSONAL OUTSIDE ACTIVITIES SUPPLEMENT

## A. Personal and Financial Conflicts of Interest

1. An employee may not personally and substantially participate in an official capacity in a matter in which he (or certain others) has a financial interest if participation will have a direct and predictable affect on that interest.
2. An employee also may not personally and substantially participate in a matter if it involves a person or entity with whom the employee has a special relationship--called a "covered relationship." This includes a nonfinancial, yet personal, conflict of interest.
3. Personal Financial Interests imputed to you (i.e. you generally may not participate in matters involving these entities):
  - a. The interests of a company or business you work at, own as a partner, or serve as an officer (imputed for one year); or a company you own stock in (unless worth less than \$5,000).
  - b. The interests of your spouse and children.
  - c. The interests of "members of your household" or those with whom you have a "close, personal relationship."
  - d. The interests of an organization you serve as an officer or director (imputed for one year)
  - e. The interests of an organization you "actively participate" in; includes serving as an officer or committee chair or otherwise directing the organization's activities (may include aggressive endorsement). Active participation means more than mere membership.

4. Appearance Problem-Consideration of appearances of a conflict of interest by an employee.
  - a. A conflict of interest also occurs where a reasonable person with knowledge of the relevant facts would question the employee's impartiality in the matter--the mere appearance of a conflict invokes the rules.
  - b. Employee may still act on the matter when agency designee issues a written authorization after considering the matter. Obtain Ethics Counsel opinion.
5. Job-Hunting. Prohibitions against working on a matter involving a company with which you are seeking employment.
6. Example. Employee who moonlights as a salesperson at XYZ Computer Store may not be involved personally and substantially in the procurement of computers for the office from XYZ Computers.
7. Example. President of the local AUSA chapter (or unit sub-chapter) may not, in an official capacity, approve a request for use of DoD space by the Association.

B. Private Businesses (JER para. 2-205) (applies on and off duty).

1. **Punitive provision:** DoD employees may not solicit or make any solicited sales to personnel who are junior in rank, grade, or position to them
2. May also not solicit or make solicited sales to the family members of the junior employee.
3. Exception: As long as there is no coercion or intimidation, it is okay to make sales off-duty from an off-post retail establishment or sell or lease your own personal property or real estate.

C. Employment Prohibitions.

1. During Your Federal Service.

- a. May not engage in any outside employment if it conflicts with your federal duties.
- b. Commands may require pre-approval for outside employment. Filers of financial disclosure forms must obtain prior approval.
- c. General Officers may not sit as an officer or director of an outside organization for compensation.
- d. May not receive improper supplementation of your federal salary for performing your official duties (18 USC § 209).

2. After Your Federal Service.

- a. May not "switch sides" and work for a contractor on the same matter you handled as a DoD employee.
- b. DoD personnel involved working with contractors have special rules under the Federal Acquisition Regulation. Contract personnel should consult their Ethics Counselor for post-employment issues.

D. Honoraria and Teaching, Speaking, and Writing.

- 1. Statutory ban on Honoraria--that is, compensation for a lecture, speech, or writing-- was "effectively eviscerated" by the U.S. Supreme Court. (See JER 3-307c.)

2. Prohibitions remain, however, on "Teaching, Speaking, and Writing."
  - a. May not receive compensation for teaching, speaking, and writing related to your official duties, i.e., cannot re-package your federal work and profit from it.
  - b. Does not preclude teaching, speaking, and writing in an inherent area of your expertise based on your education or experience even though it may deal generally with a subject within your official responsibility/
  - c. May receive compensation for teaching courses at certain educational institutions even if the subject is related to your official duties. Seek ethics counselor advice.
  - d. May not use your rank or official position to promote your teaching, speaking, and writing. May include it in a title or bio and, if the subject deals with an ongoing agency program or policy, must include a disclaimer.
- E. Political Activities (JER 6-300; DoD Directive 1344.10; AR 600-20, para 5-3 and Appendices B & C).
  1. Soldiers may not engage in partisan political politics or use your position to solicit votes or contributions.
  2. Registering to vote, voting, expressing an opinion, making monetary contributions are generally okay.
- F. Gambling (JER 2-302). Punitive Provision.
  1. Gambling is prohibited on federally-owned or leased property or anywhere while on duty.
  2. Rule allows private wagers in housing areas if based upon a personal relationship if IAW local laws. But: UCMJ may prohibit if a violation of punitive provisions regarding gambling with a subordinate.

## PRINCIPLES OF ETHICAL CONDUCT

1. **Public Service is a public trust**, requiring employees to place loyalty to the Constitution, the laws and ethical principles above private gain.

2. Employees **shall not hold financial interests that conflict with the conscientious performance of duty.**

3. Employees **shall not engage in financial transactions using nonpublic Government information** or allow the improper use of such information to further any private interest.

4. An employee **shall not**, except as [provided for by regulation], **solicit or accept any gift or other item of monetary value** from any person or entity seeking official action from, doing business with, or conducting activities regulated by the employee's agency, or whose interests may be substantially affected by the performance or nonperformance of the employee's duties.

5. Employees **shall put forth honest effort in the performance of their duties.**

6. Employees **shall not knowingly make unauthorized commitments** or promises of any kind purporting to bind the Government.

7. Employees **shall not use public office for private gain.**

8. Employees **shall act impartially and not give preferential treatment** to any private organization or individual.

9. Employees **shall protect and conserve Federal property** and shall not use it for other than authorized activities.

10. Employees **shall not engage in outside employment or activities**, including seeking or negotiating for employment, **that conflict with official Government duties** and responsibilities.

11. Employees **shall disclose waste, fraud, abuse, and corruption** to appropriate authorities.

12. Employees **shall satisfy in good faith their obligations as citizens**, including all just financial obligations, especially those--such as Federal, State, or local taxes--that are imposed by law.

13. Employees **shall adhere to all laws and regulations that provide equal opportunity for all Americans** regardless of race, color, religion, sex, national origin, age, or handicap.

14. Employees **shall endeavor to avoid any actions creating the appearance** that they are violating the law or ethical standards. Whether particular circumstances create an appearance that the law or these standards have been violated shall be determined from the perspective or a reasonable person with knowledge of the relevant facts.





# CHAPTER H

## LAW OF MILITARY INSTALLATIONS

### NON-FEDERAL ENTITIES & PRIVATE ORGANIZATIONS

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## **Outline of Instruction**

### **I. REFERENCES.**

- A. Dep't of Army, Reg. 1-211, Attendance of Military and Civilian Personnel at Private Organization Meetings (10 Mar 1988).
- B. Dep't of Army, Reg. 210-22, Private Organizations on Department of the Army Installations and Official Participation in Private Organizations (22 Oct 2001).
- C. Dep't of Army, Reg. 360-61, Community Relations (15 Jan 1987).
- D. Dep't of Army, Reg. 405-80, Granting Use of Real Estate (10 Oct 1997).
- E. Dep't of Army, Reg. 600-29, Fund-Raising Within the Department of the Army (20 March 1992).
- F. Dep't of Army, Reg. 725-1, Special Authorization and Procedures for Issues, Sales, and Loans (25 Sep. 1989).
- G. Dep't of Defense, Dir. 1015.19, Professional United States Scouting Organization Operations at United States Military Installations Located Overseas (31 Oct. 1990).
- H. Dep't of Defense, Instr. 1000.15, Private Organizations on DoD Installations (October 23, 1997).
- I. Dep't of Defense, Dir. 1100.20, Support and Services for Eligible Organizations and Activities Outside the Department of Defense (January 30, 1997)
- J. Dep't of Defense, Dir. 5035.01, Combined Federal Campaign (CFC) Fund-Raising Within the Department of Defense (May 7, 1999).
- K. Dep't of Defense, Dir. 5410.18, Community Relations (July 3, 1974).

- L. Dep't of Defense, 5500.7-R, Joint Ethics Regulation (Aug. 1993) (w/ Change 4).
- M. 10 U.S.C. § 2012 (support to state and civic organizations).
- N. 10 U.S.C § 2606 (overseas scouting); 10 U.S.C. §§ 2544, 2545, 2606 (transportation of scouts and scout officials).
- O. 10 U.S.C. § 2548 (support of national military associations).
- P. Non-Federal Entity under JER para. 1-221: A non-Federal entity is generally a self-sustaining, non-Federal person or organization, established, operated and controlled by any individual(s) acting outside the scope of any official capacity as officers, employees or agents of the Federal Government. A non-Federal entity may operate on DoD installations if approved by the installation commander or higher authority under applicable regulations.

## II. PRIVATE ORGANIZATIONS.

- A. Private Organizations under DoDI 1000.15 (basically a subset of NFEs that operate on post).
  - 1. Definition. A self-sustaining, nonfederal entity constituted or established and operated on a DA installation by individuals acting outside any official capacity.
  - 2. POs - Nonfederal Entities. POs are not part of the military organization. No official relationship exists between PO activities and official duties and responsibilities of DoD personnel who are PO members or participants.
  - 3. No privileges and immunities.
- B. Private Organizations under Army Regulations.
  - 1. **AR 210-1 rescinded.**

2. Installations must "develop a prescribed plan to administer and execute a local process for approving or disapproving requests from private organizations." Policies must be consistent with JER and DoD Instruction 1000.15, Private Organizations on DoD Installations (23 October 1997).
3. "Informal funds" - Office funds, including coffee, cup and flower, and annual picnic funds. No monetary minimum/maximum. See AR 600-20, para 4-21 (15 July 1999).

### **III. OFFICIAL PARTICIPATION (JER CHAPTER 3, SECTION 2).**

- A. Membership. Liaison where significant and continuing DOD interest served by representation (JER 3-201).
- B. Management.
  1. \* JER 3-202, Management of Non-Federal Entities by DOD employees acting in their official capacities. Implements provisions from the NDAA of 1998 codified in 10 USC 1033, 1589, and 2012.
  2. DOD DAEO (General Counsel) authorization required to participate as official military representative in PO management. With authorization, may represent DOD in discussions of mutual interest, participate in determinations and conclusions, and vote on such matters.
  3. Sec Army, w/ DOD GC approval, may designate personnel to serve in their official capacities without compensation as an officer, director, or otherwise participate in the management of an NFE designated by DODGC (see below);
  4. Personnel may serve only to provide oversight and advice to NFE—not day-to-day operations. Sec Army must delineate specific duties;
  5. DOD GC designation of entities:
    - a. Military Welfare Societies: Army Emergency Relief; Air Force Mutual Aid Society, Inc.; Navy-Marine Corps Relief Society; Coast Guard Mutual Assistance.

b. Other entities which:

- (1) regulate service academy athletics, international athletic competitions, and performance, standards, and policies of military health care; or
- (2) accredit service academies & other DoD schools.

C. Meeting Attendance. Personnel may attend at Government expense when information gained will "substantially benefit the approving authority's mission" (see AR 1-211, Attendance of Military and Civilian Personnel at Private Organization Meetings (1 Jun 84)). AR 1-211, Table 1:

<i>If the meeting -</i>	<i>Then the individual may</i>
Is of direct and substantial benefit to the approving authority and to DOD and Government funds are available	be authorized travel expenses and per diem and permitted to attend in a TDY status.
Is of a quasi-official nature and the approving authority will receive some benefit from attendance which is not direct or substantial	be authorized attendance in a permissive TDY status without payment of travel expenses, per diem, or other reimbursable entitlements.
Is of marginal or no benefit to the approving authority	be authorized leave and incur all expenses connected with travel.

D. Endorsement. Punitive prohibition: employees may not use their official capacities, titles, positions, or organization names to suggest official endorsement or preferential treatment of a non-Federal entity, event, product, service, or enterprise. Employees may only use their titles, positions, or organization names to identify themselves relative to performance of official duties. (JER 3-209.)

E. Support.

1. Impartiality required (JER 3-204).
2. JER 3-211 authorizes limited support when commander determines:
  - a. the support does not interfere with official duties and does not detract from readiness;

- b. the private organization is not affiliated with the Combined Federal Campaign (CFC), or approval has been obtained from the CFC Local Federal Coordinating Committee;
- c. legitimate DOD interests, such as community relations, are served;
- d. the event is appropriate for DOD support;
- e. the event is of interest to the civilian or military community as a whole;
- f. the DOD organization is willing to provide similar support to other similar events so as to avoid the appearance of unduly favoring one organization over another;
- g. there are no statutes or regulations restricting the support; and
- h. either no admission fee is charged for the event, no fee is charged for the supported portion, or DOD support is incidental to the event.

F. Fundraising. (JER 3-210 and 211)

- 1. **JER 3-211b & 3-300a2:** Clarifies that the commander may designate areas on an installation that are considered to be "outside the federal workplace" for fundraising purposes. Fundraising by CFC entities in those areas is not subject to OPM approval.
- 2. No official endorsement of PO fundraising or membership drives unless exception exists.
- 3. Exceptions: special organizations (e.g., CFC, AER, other organizations composed of DOD employees/dependents when fundraising among their own members for their own benefit when commander approves) This year includes charitable, community, or civic organizations eligible for NG support under 32 USC 508 (JER 3-210).

G. On-post POs. Installations must establish local policies concerning authorizing PO's to operate on the installation. (AR 210-1)

H. Community Relations Program; AR 360-61; DoD Dir.5410.18.

1. Provide support to public events that will: (1) Increase public awareness of Army missions; (2) Inspire patriotism; (3) Foster good relations; (4) Maintain the Army's reputation; and (5) Support recruiting.

2. Restrictions (AR 360-61, para 2-3).

a. No selective benefit whatsoever.

b. No support to organizations which discriminate.

c. Army support is incidental to the event, except for patriotic programs or celebrations of national holidays, and the event is open to the public.

d. No demeaning work for soldiers (guards, parking lot attendants).

e. No support for clearly commercial events.

f. May not compete w/ resources commercially available, including: Commo equipment, transportation, A/V support, ambulances, PA systems, food handling equipment, bleachers, tents, earth-moving or other construction equipment.

g. May not interfere with the customary or regular employment of civilians in their art, trade, or profession.

3. Relations with Organizations and Associations. AR 360-61, Chapter 5.

a. Follow Ethics rules.

b. Command memberships authorized; appoint a liaison.



4. Band support - Strictly limited so as not to compete w/ civilian musicians.
5. Loan of material and facilities: Non-competition per para 11-4.

#### **IV. PERSONAL PARTICIPATION (JER, CHAPTER 3, SECTION 3).**

- A. Membership (JER 3-301). Generally okay.
- B. Management (JER 3-301). Okay, unless offered because of official Government position.
- C. Endorsement (JER chapter 2, 5 C.F.R. § 2635.702(e)). Generally okay, with caution--personal capacity. (JER 3-300a(1): Colonel Smith, U.S. Army.)
- D. Support (JER 3-300c) - community support activities that promote civic awareness (e.g., disaster relief events).
- E. Fundraising (JER 3-300a). Okay *if* commander authorizes outside Government workplace (e.g., public entrances, in community support facilities, and in personal quarters) and purely in personal capacity (e.g., off duty, not in uniform).
- F. Representational Activities. 18 U.S.C. 205 prohibits DOD employees from acting as agent for a PO before the Government.
  1. The only permissible contacts on behalf of a PO are those that are "ministerial" in nature: conveying purely factual information; delivering or receiving materials or documents; answering (without advocating for a particular position) requests for information; or signing a document that attests to the existence or non-existence of a given fact (PO rep's attestation that a given signature is valid).
  2. May, however, represent certain non-profit organizations before the Government, (request support for scouts).

## **V. FAMILY SUPPORT GROUPS.**

### **A. References.**

1. Dep't of Defense, 5500.7-R, Joint Ethics Regulation (Aug. 1993).
2. Dep't of Defense, Instr. 1000.15, Private Organizations on DoD Installations (23 October 1997).
3. Dep't of Defense, Instr. 1342.23, Family Readiness in the National Guard and Reserve Components (September 29, 1994).
4. Dep't of the Army Pamphlet 608-47, A Guide to Establishing Family Support Groups (16 August 1993).
5. Dep't of the Army, Reg. 215-1, Morale, Welfare, and Recreation Activities and Nonappropriated Fund Instrumentalities (25 Oct 1998) (para 4-11k, volunteers; para 7-40, gratuitous services).
6. Dep't of the Army, Reg 608-1, Army Community Service Center (1 October 1999).
7. Dep't of Army 600-20, Army Command Policy (15 July 1999), para 5-10.
8. HQDA Letter 608-98-1, Volunteer Services Pilot Program Expansion Army Wide (10 April 1998; expires April 2000).
9. Ass't Chief of Staff for Installation Management (ACSIM) Note, February 1999.

- B. FSGs are a command sponsored official organization composed of military members and volunteers (family members, soldiers, DA civilians) of a unit that provides mutual support, assistance, and communications between family members, commanders, and community resources.

1. They foster an atmosphere of mutual concern among family members and support unit readiness. They are a formalization of activities spouses have been involved in since the beginning of military service.
2. FSGs are an official recognition of -- and support to -- volunteer groups that assist family members and soldiers. They improve quality of life and support the Total Army Family Program. They help family members feel that they are an integral part of the Army family.

C. Official Activities and support.

1. Publication of a newsletter. Newsletters are official and may be printed with APFs provided the newsletter contains official information and is approved by the commander. Commanders should apply the following guidelines when determining if information is official.
  - a. Information related to unit mission and readiness, including family readiness is official.
  - b. Information which is educational in nature, designed to promote informed self-reliant service members and families is official.
  - c. Information regarding service members and families which promotes unit cohesion and helps strengthen the ongoing esprit among families within the command is official.
  - d. Unofficial information includes births, welcome and farewell messages, and recipes.
  - e. If the newsletter also contains unofficial information, NAF funds may be used for production and mailing--APF may not be used
  - f. Official mail. FSGs may use official mail if the document is official, mission related, and approved by the commander.
2. Government facilities, dedicated office space, supplies, desks, computers, copiers, telephones, and other equipment.

3. Use of Military Vehicles. Government vehicles may be used to support FSG activities when the following exists -
    - a. The appropriate commander determines that the use of the vehicle is for official purposes, and that failure to provide such support would have an adverse effect on soldier morale.
    - b. The driver has a valid and current license to operate the vehicle.
    - c. The use of the vehicle can be provided without detriment to the accomplishment of the unit's needs.
  4. Training and travel. Commanders may authorize NAFs or APFs to pay for travel and training of volunteers to improve their effectiveness in assigned roles or to enable them to accept increasing challenges.
  5. Reimbursement of incidental expenses. Commanders may authorize NAFs or APFs to reimburse FSG leaders and designated volunteers for out-of-pocket costs, such as childcare, telephone costs, mileage, and similar expenses.
  6. NAF funds are authorized for awards, banquets, and mementos for volunteer recognition programs. APF funds are only available for official certificates of recognition.
- D. FSGs may be "dual-hatted," to include a FSG auxiliary organization, which may generate its own funds to support FSG activities. Army policy, however, is not to encourage FSG fundraising! See ACSIM Note, February 1999, indicating that Family Support Groups should only organize "auxiliary" organizations as informal funds and not as private organizations. The original purpose of Informal Funds was to serve essentially as a bank account, not a fundraising organization.
- E. FSG-Generated Funds.
1. There is no dollar limits to informal funds unless established by the local command.
  2. Disposition of FSG generated funds are solely at the discretion of the leadership of the auxiliary PO.

3. When an FSG is fundraising, treat it like a non-federal entity (see attached Information Paper on FSG Fundraising. See also the attached Ethics Advisory from Army Materiel Command).
- F. Solicitations of outside sources by FSG members.
1. Military personnel, or their spouses, may not solicit an outside source for a gift because of the service member's official position.
  2. May not solicit a prohibited source.
  3. May not solicit when to do so is contrary to the installation's Commercial Sponsorship program (AR 215-1, para 7-47).

## **VI. CONCLUSION.**

**CHAPTER I**  
**LAW OF MILITARY INSTALLATIONS**  
**NONAPPROPRIATED FUND INSTRUMENTALITIES AND**  
**MORALE, WELFARE, AND RECREATION ACTIVITIES**

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## **Outline of Instruction**

### **I. REFERENCES.**

- A. DODI 1015.10, Subject: Programs for Military Morale, Welfare, and Recreation (November 3, 1995).
- B. AR 215-1, Morale, Welfare, and Recreation Activities and Nonappropriated Fund Instrumentalities (25 October 1998) (effective 25 November 1998) (New regulation to be issued spring 2001).
- C. AR 60-10/AFR 147-7, Army and Air Force Exchange Service General Policies (17 June 1988); AR 60-20/AFR 147-14, Army and Air Force Exchange Service Operating Policies (15 December 1992).

### **II. INTRODUCTION.**

Service MWR Headquarters:

Army Community and Family Support Center (CFSC) ([trol.redstone.army.mil/mwr/](http://trol.redstone.army.mil/mwr/))

Navy Morale, Welfare, and Recreation Division ([www.mwr.navy.mil](http://www.mwr.navy.mil))

Air Force Services Agency ([www-r.afsv.af.mil](http://www-r.afsv.af.mil))

Marine Corps Community Service (MCCS) ([www.usmc-mccs.org](http://www.usmc-mccs.org))

### **III. NONAPPROPRIATED FUND INSTRUMENTALITIES (NAFIS)-- OPERATIONS AND FUNDING.**

- A. Definition: A DoD organizational entity which performs an essential government function. It provides morale, welfare, and recreational programs for military personnel and civilians. As a fiscal entity, it maintains custody and control over nonappropriated funds. It is not incorporated under the laws of any state and enjoys the legal status of an instrumentality of the United States. AR 215-1, Glossary.
- B. First U.S. Military NAFI - 1775.
- C. Objectives of the MWR Program. DODI 1015.10, para. D1; See also AR 215-1, paras. 1-7 through 1-9.



1. Maintain a high level of esprit de corps.
2. Maintain physical and mental well-being.
3. Encourage the constructive use of time.
4. Aid in recruitment and retention.
5. Assist in the adjustment to military life.
6. Provide a community support environment.
7. Create a self-sustaining military community.
8. Reinforce unit cohesion.
9. Increase combat readiness.

D. Congressional Interest in NAFIs.

1. Initially, reaction to business and private concerns over PX and MWR activities.
2. Two congressional committees—the primary committee is the MWR Panel of the Readiness Subcommittee of the House Armed Services Committee.
  - a. Broad interests—construction, financing, and services.
  - b. NAFIs should operate like a business.

E. Command Responsibilities for NAFI Operations. AR 215-1, ch. 2.

1. Secretary of the Army has overall responsibility. AR 215-1, para. 2-1.

2. Assistant Chief of Staff for Installation Management (ACSIM) is proponent and focal point for all MWRs and NAFIs. AR 215-1, para 2-1c.
3. U.S. Army Community and Family Support Center (USACFSC). AR 215-1, para. 2-5.
  - a. Recommends to the ACSIM Army policy.
  - b. Reviews the MWR program and establish business strategies. Provides management and technical assistance.
  - c. Reviews and approves request for establishment of all Army NAFIs.
  - d. Develops financial management practices for the management of MWR and NAF resources.
  - e. Administers Armed Forces Recreation Centers (AFRCs) and the Army Recreation Machine Program (ARMP).
4. Major Army Commands (MACOMs). AR 215-1, para. 2-3.
  - a. Provide oversight and ensure APF and NAF funds are properly used.
  - b. Allocate APF based upon installation needs and the five-year plan priorities.
  - c. Conduct MACOM-level MWR events.
5. Installation Commanders. Operate MWR programs, the IMWRF, and local NAFIs. AR 215-1, para. 2-4.

F. Funding of NAFIs.

1. APF support for MWR personnel, operations, supplies, and other expenses. See DODI 1015.10, encl. 6, and AR 215-1, ch. 4 & App D.
2. Nonappropriated funds--those generated by NAFI activities.
3. Construction funding. AR 215-1, ch. 10 (Sec. II) and App. E.
  - a. Army Morale, Welfare, and Recreation Fund (AMWRF) for NAF construction. AR 215-1, para. 10-8.
    - (1) Funded by AAFES revenues, monthly capital reinvestment assessment of all NAFI income, and interest. DODI 1015.10, para. D8; AR 215-1, para. 11-8.
    - (2) Pays most of major construction costs.
    - (3) Installation funds design cost (includes furniture, fixtures, and equipment), opening costs, all environmental costs, and project validation costs (market analysis). AR 215-1, para. 10-8.
  - b. Market analysis required. AR 215-1, para. 10-2.
  - c. Public-Private Ventures. . DODI 1015.13, Department of Defense Procedures for Implementing Public-Private Ventures (PPVs) for Morale, Welfare and Recreation (MWR) Category C Revenue-Generating Activities (June 17, 1998); AR 215-1,para. 10-12
    - (1) In order to meet MWR requirements, installations may identify activities that are unavailable through normal funding sources and that may be met by the private sector. The Army leases the land for a facility, and the contractor builds the activity and operates it, with the IMWRF receiving a percentage of profits.
    - (2) Requires approval/coordination w/ CFSC and an extensive local survey prior to approval. Congress notified by DoD

4. Organization of NAFIs. See DODI 1015.10, para. D3 and encl. 4; AR 215-1, para. 4-1.
  - a. Category A: Mission-Sustaining Activities. AR 215-1, paras. 4-1a, 11-4a(1).
    - (1) Essential to sustaining readiness and have little or no capacity to generate NAF income.
    - (2) Supported with APF--up to 100%; DoD minimum is 85%.
    - (3) NAF funding only allowed for:
      - (a) Specific expenses for which APFs are not authorized, or
      - (b) When use is not otherwise prohibited and it is certified in writing that APF is not available.
    - (4) Category A activities are:
      - Armed Forces Professional Entertainment Program Overseas.
      - Gymnasium/Physical Fitness/Aquatic Training.
      - Libraries.
      - Parks and Picnic Areas.
      - Recreation Centers/Rooms.
      - Shipboard/Isolated/Deployed/Free Admission Motion Pictures.
      - Sports/Athletics (Self-Directed, Unit Level, Intramural).
      - Unit Level Programs and Activities.
  - b. Category B: Community Support Activities.
    - (1) Satisfies the basic needs of soldiers and their families. Makes installations temporary home towns. Different than category A because of their ability to generate some income. AR 215-1, para. 4-1b.

(2) Requires substantial APF support. DoD target is at least 65% APF. AR 215-1, para 11-4a(2).

(3) Category B activities are:

- Arts and Crafts Skill Development.
- Bowling Centers (less than 13 lanes).
- Automotive Crafts Skill Development.
- Child Development Services.
- Entertainment (Music and Theater).
- Information, Ticketing, and Registration Services.
- Outdoor Recreation.
- Recreational Swimming Pools.
- Sports Programs (above the intramural level).
- Youth Services.
- Stars and Stripes.

c. Category C: Revenue-Generating Activities. AR 215-1, para. 4-1c.

(1) Has less impact on readiness and provides recreational opportunities.

(2) Has ability to generate income to cover most operating expenses. Only indirect APF support.

(3) At remote sites (see AR 215-1, table 4-1, for listings), these may receive APF on the same basis as category B. AR 215-1, para. 4-4.

(4) Examples include:

- Aero Clubs.
- Amusement Machine Locations and Centers.
- Armed Services Exchange and Related Activities.
- Armed Forces Recreation Centers.
- Audio/Photo and Retail Sales (Overseas)
- Bingo.
- Bowling Centers (over 12 lanes).
- Food Beverage, and Entertainment Operations.
- Golf Courses.
- Military Clubs.
- Others.

(5) Temporary Guest Facilities, Cabins, Cottages, Cabanas, Recreational Guest Houses. No longer a Category C MWR activity. Now a stand-alone entity with its own revolving fund.

d. Supplemental Missions. AR 215-1, paras. 4-7 and 4-8.

(1) Established to support a mission activity of the Army.

(2) Income and funding maintained at a level to “break even.”

(3) Examples include:

- Army Community Services.
- Veterinary Services.
- Supplemental Field Ration Dining Facility Funds.
- NAF Billeting.
- Fisher House Funds.
- Military Historical Museums.
- USMA NAFIs.
- School Lunch Funds.
- Vehicle Registration Fund.
- Disciplinary Barracks Funds.

5. Installation Morale, Welfare, and Recreation Fund (IMWRF), the “One Fund.” AR 215-1, para. 4-6.

a. Goals.

- (1) Designed to make NAFIs operate in a more businesslike fashion.
- (2) Designed to help NAFIs better meet the needs of the military community.

b. Operation of IMWRF.

- (1) Central control under the installation commander.
- (2) Fund manager for IMWRF will be the Director for Community Activities (DCA). AR 215-1, para. 11-2b.
  - (a) Responsible for overall fiscal operation.

- (b) Responsible for establishing sound management functions.
- (3) NAFI councils are required (except for DA or MACOM administered NAFIs). Councils will be governing (directing and supervising the fund manager) or non-governing (advisory only). AR 215-1, paras. 5-8 - 5-10.
  - (a) Members will be full-time DoD civilians and active duty military. AR 215-1, para. 5-9.
  - (b) Made up of fund manager (nonvoting) and at least four other (voting) members. AR 215-1, para. 5-9.
- c. DoD MWR Utilization, Support, and Accountability (AR 215-1, para. 4-3). Implements DoD policy found in Ass't Sec Def (Force Management Policy) Memo, 23 July 1997, DoD Morale, Welfare, and Recreation Utilization, Support, and Accountability (DoD MWR USA) Practice.
  - (1) Designed to foster efficiency in the use of appropriated and nonappropriated funds.
  - (2) Allows the use of NAF contracting and personnel procedures to meet an APF MWR need. APF must then reimburse the IMWRF for the expenses.
  - (3) Must have a Memorandum of Agreement in place.
  - (4) Not available for installations participating in the Uniform Resource Demonstration Funding Project (White Sands and Ft. Campbell).
- d. Unit Funds. AR 215-1, para 5-11c clarifies proper expenditures of unit funds, including "unit activity" funds established by MACOMs.



- (1) Funds must be used for the collective benefit of all unit members for off-duty recreational purposes authorized by AR 215-1.
- (2) All members must have the opportunity to participate.
- (3) Activities must relate to the morale, welfare, and recreation needs of the unit members. Family members and guests may attend at the discretion of unit members.



6. Solicited Commercial Sponsorship. DODI 1015.10, encl. 9; AR 215-1, para. 7-47. Allowed for MWR activities, Army Family Team Building, and Army Family Action Plan only.
  - a. Advertising, publicity, or other promotional consideration must be commensurate with the level of sponsorship offered.
  - b. Solicitation must be competitive and sponsorship award must be based upon the best value received and the appropriateness of the sponsor. No favored treatment allowed for sponsors and no penalties for nonsponsors.
  - c. All agreements must receive legal review (personnel involved in APF contracting may not be directly or indirectly involved in the solicitation).
  - d. All public recognition of sponsors must have disclaimers, i.e., “sponsorship does not imply endorsement.”
  - e. Contents of all proposed public recognition must be reviewed to ensure compliance with DoD Directives.
  - f. May not solicit alcohol or tobacco manufacturers but may accept unsolicited offers.

- g. Sponsorship agreement must be in writing and for one year or less (extensions OK, up to five years). Also must include certification that no sponsorship costs will be charged to the Federal Government.
  - h. Open house programs are public affairs office events (not MWR). PAO must approve MWR events during open houses.
- 7. Gifts. NAFIs can accept conditional or unconditional gifts from individuals or private organizations. AR 215-1, para. 7-39.
  - a. Acceptance of the gift must be in the Army's best interest.
  - b. Gifts may not be requested, and donors receive no preferential treatment.
  - c. Fund managers may accept gifts of up to \$5,000 when delegated authority by local commander.
  - d. Local commanders may accept gifts of up to \$25,000.
  - e. MACOM commander may accept gifts up to \$50,000 in value.
  - f. CFSC may accept gifts valued up to \$200,000.
  - g. Secretary of the Army may accept gifts valued over \$200,000.

G. Patronage.

- 1. Equal access for Reservists for Category C activities. AR 215-1, para. 6-2a (implementing 10 USC 1065).
  - a. Gives Ready and Selected Reserve members same priority as active duty members for Category C activities.
  - b. Gives Gray area retirees (retired reservists under 60) same priority as regular Army retirees for Category C activities.

- c. Changes not applicable to Category A and B activities.
    - d. Family members have same priority as their sponsor.
  - 2. State and local government use. AR 215-1, para. 6-2h(3).
    - a. May use Category A or B activities when the facilities have excess capacity when the use is at no additional cost to the Army.
    - b. Must establish a Memorandum of Understanding.
  - 3. Routine use of MWR activities by members of on-post private organizations is prohibited unless the member otherwise qualifies. AR 215-1, para. 6-2i.
  - 4. Allows ASA (M&RA) to approve a waiver to allow the general public to patronize Category C activities when the facility is under-utilized and the local community agrees (except for bingo).
- H. Prohibited Uses of NAFIs. AR 215-1, para. 4-12.
- 1. Use must withstand public scrutiny test.
  - 2. Donations to private organizations.
  - 3. Charitable contributions or assistance in collection of charitable donations.
  - 4. Change of command, retirement ceremonies, funerals, or other personal-type events for selected individuals.
  - 5. Items authorized to be funded with APFs.
    - a. Under some circumstances, NAFs may be used for MWR activities if APFs are not available.

- b. Requires written authorization that authorized APFs cannot satisfy the requirements.
    - c. Consider fiscal limitations set out in Congressional appropriations and authorizations.
  - 6. Spending must be connected to command morale and welfare.
- I. APF Contracting with NAF Activities (Overturning the Mattress Decision, 58 Comp. Gen. 94, Nov. 21, 1978). AR 215-1, para. 7-34 (implements 10 USC 2482a);
  - 1. Authorizes APF activities to contract w/ a NAFI for purchases up to \$2,500 using micropurchase procedures (rotating sources) with the IMPAC card
  - 2. Authorizes APF activities to contract w/ a NAFI for purchases exceeding \$2,500 when justified as a sole-source contract using APF procedures.
  - 3. Must be for goods or services "integral to the ongoing functions performed by the NAFI in support of the NAFI mission."
  - 4. Overseas, APF activities may contract with the PX for purchases up to \$50,000 (implements 10 USC § 2424).

#### **IV. LIABILITY OF NAFIS.**

- A. NAFIs as Federal Instrumentalities (Standard Oil Co. of California v. Johnson, 316 U.S. 481 (1942)). AR 215-1, para. 3-1.
- B. Tax Liability AR 215-1, ch. 3, sec. III and para. 3-1b(2).
  - 1. Federal. Alcohol wholesale & retail taxes. AR 215-1, paras. 3-10 and 3-12.
  - 2. State and local. AR 215-1, paras. 3-13 and 3-14.

- a. Waiver of immunity. 4 U.S.C. § 104.
  - b. Legal versus economic incidence of tax. AR 215-1, para. 3-13a.
- C. Tort Liability. AR 215-1, para. 3-1.
  - 1. Suits by NAFI employees. Exclusive remedy is under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901.
  - 2. Suits by third parties. Federal Torts Claims Act. AR 215-1, Ch. 14.
- D. Contract Liability. AR 215-4.
  - 1. NAFIs have sovereign immunity from suit, but administrative remedies exist. *Borden v. United States*, 116 F. Supp. 873 (Ct. Cl. 1953).
  - 2. Waiver of sovereign immunity for suit against the Exchange Service. Tucker Act, 28 U.S.C. § 1346.
- E. Concessionaires status. They are private businesses and not instrumentalities of the United States. They are not entitled to any of the privileges and immunities of the Federal Government. AR 215-1, para. 3-2.

## **V. NAFI EMPLOYEES.**

- A. References.
  - 1. DoD 1401.1-M, Personnel Policy Manual for Nonappropriated Fund Instrumentalities (Dec. 1988); DoD 1401.1-M-1, Job Grading System Manual for Nonappropriated Fund Instrumentalities (Oct. 1980).
  - 2. DODI 1015.10, para. D12.
  - 3. AR 215-1, ch. 9 and App. D; AR 215-3.

- B. Generally, NAFI employees are civilians. AR 215-3, para. 1-5.
- C. Military.
  - 1. Enlisted soldiers may be employed if off duty and if no interference with duty. AR 215-3, para. 2-16a.
  - 2. Officers may provide off-duty service on a fee basis. AR 215-3, para. 2-16b.
- D. NAFI employment must comply with the applicable federal labor laws, but NAFI employees do not fall under OPM or the Federal Employment Compensation Act.

**VI. CLUBS.** AR 215-1, para. 8-17b.

- A. Financial Status. Clubs must operate without a loss, or MACOM Commander must explain to MWR BOD why club should not close.
- B. Army Theme Restaurants.



- C. Membership.
  - 1. Voluntary membership. AR 215-1, para. 8-17b(3); AR 600-20, para. 4-11.
    - a. Can't require reasons for ending or declining club membership.
    - b. Can't engage in any practice that involves or implies coercion, influence, or reprisal in the conduct of membership campaigns.

- (1) No repeated orientations, meetings, or similar counseling of persons who have chosen not to join.
  - (2) No use of membership statistics in support of supervisory influence.
- c. Encouraging membership.
  - (1) Sponsoring membership drives.
  - (2) Giving information to potential members, i.e., when they in-process.
  - (3) Structuring and running club activities based on the desires and support of patrons.
  - (4) Letter from commander encouraging club membership—must not use improper pressure.

2. Nonmember use of the club. AR 215-1, para. 8-17b(7).

- a. Personnel in a transient or TDY status for less than 30 days. AR 215-1, para. 8-17b(7)(a)2.
- b. To attend special functions. AR 215-1, para. 8-17b(7).
- c. Bona fide guest of a member. AR 215-1, para. 8-17b(7)(a)1.
- d. Others.
- e. Nonmembers may be charged a different price than members.

**VII. UNAUTHORIZED/RESTRICTED ACTIVITIES. DODI 1015.10, PARA. D10; AR 215-1, PARA. 8-35.**

- A. Lotteries or sale of lottery tickets.
- B. Pull-tab bingo.
- C. Sale of chit books related to the sale of alcohol.
- D. Nude dancing. AR 215-1, para. 8-12.
- E. Awarding alcohol as a prize. AR 215-1, para. 7-14(e).
- F. Pornography Sales.
  - 1. Military Honor and Decency Act of 1996 (10 USC § 2489a), implemented by DoDI 4105.7, Sale or Rental of Sexually Explicit Material on DoD Property (June 29, 1998). Prohibits sale or rental of sexually explicit material on "property under the jurisdiction of DoD" (DoD resale activities).
    - a. Includes DeCA, AAFES, NEX, MCX and U.S. Navy Ships Stores.
    - b. Does not include entities that are not instrumentalities of the U.S.
    - c. Other MWR activities covered? Not by the letter of the law.
    - d. Covers audio and video recordings and periodicals with visual depictions produced in any medium.
  - 2. Suit brought to enjoin enforcement by DoD.



- a. General Media Communications, Inc. v. Cohen, 952 F.Supp. 1072 (20 February 1997, U.S. District Court, Southern District of New York). Court ruled the statute unconstitutional and issued permanent injunction prohibiting DoD from implementing the Act.
- b. GMC v. Cohen, 131 F.3d 273 (21 November 1997, U.S. Court of Appeals, 2d Circuit). Court overturned the lower court's holding, finding the Act constitutional and within Congress' authority.
- c. GMC v. Cohen, 118 S.Ct. 2367 (June 26, 1998). Supreme Court denied certiorari.

3. Current status.

- a. Act is implemented within DoD.
- b. DoD Resale Activities Board of Review - reviewed hundreds of periodicals --most were found violative.
- c. Another lawsuit pending in San Francisco.

G. Gambling is generally prohibited. See DoD Directive 5500.7-R, Joint Ethics Regulation § 2-302.

- 1. Monte Carlo or Las Vegas Events. DODI 1015.10, para. D11. AR 215-1, para. 8-8.
  - a. Must comply with state and local law unless on an exclusive jurisdiction installation. Overseas, international agreements apply.
  - b. Must use chips or play money. Can't use winnings to buy resale items, food, beverages, pay club bill, or exchange for cash.
  - c. MWR--four per year (overseas may be more); PO--one per year.
  - d. CONUS use of slot machines or roulette wheels is prohibited.

- e. Can't advertise via U.S. Postal Service.
2. "Grey Area Gambling Devices." Defined at AR 215-1, para 8-35g. Implements 15 USC 1171.
- a. Gambling Device vs. Amusement machine.
  - b. Game of chance vs. Game of Skill.
3. Bingo. DODI 1015.10, para. D 11a(2); AR 215-1, para. 8-6.
- a. Must comply with state and local law unless on an exclusive jurisdiction installation. Overseas, international agreements apply.
  - b. On exclusive jurisdiction areas, the NAFI need not pay state or local fees or taxes, or obtain of a bingo permit. Concurrent jurisdiction: state may regulate and charge for permits. AR 215-1, para. 3-13d.
  - c. Can't advertise via U.S. Postal Service.
  - d. Participation limited to authorized patrons and bona fide guests. Effective 4 Jan 1999, may not open bingo to general civilian populace, and contractor-operated bingo is prohibited. (Memo from ASA (M&RA) to Cdr, USACFSC, subject Bingo Activities in Army Morale, Welfare, and Recreation (MWR) Programs-- Action Memorandum, dated Nov. 5, 1998.)
4. Raffles. DODI 1015.10, para. D11a(3); AR 215-1, para. 8-19.
- a. Lotteries are prohibited.
  - b. Raffles may be conducted to raise funds for MWR activities.
- (1) Raffle proposal must receive a legal review;

- (2) The Installation Commander must give his written approval of the raffle in advance;
- (3) The raffle tickets must specify the maximum number of tickets that may be sold; and
- (4) The IMWRF's total annual prizes may not exceed a retail value of \$20,000. \$15,000 is maximum retail value for any one prize. (MACOM may grant exception.)
- (5) Raffles must comply with state and local law unless on an exclusive jurisdiction installation. Overseas, international agreements apply.
- (6) Can't advertise raffles via U.S. Postal Service.

**VIII. MWR ACTIVITIES AND ALCOHOL.** DODI 1015.1, App. 12; AR 215-1, Ch. 7, Sec. II.

A. Age Restrictions on Sale of Alcohol. AR 215-1, para. 7-7.

1. At locations outside U.S., 18 years is minimum age for the purchase of alcohol products in the overseas Military Retail System. Look at treaties and local situation for higher minimum age. AR 215-1, para. 7-7b.
2. In U.S., no one under 21 will be employed to dispense, sell, or handle alcohol unless permitted by the state. AR 215-1, para. 7-7a.

B. In U.S., drinking age will be the same as the state where the installation is located. Exceptions to drinking age restrictions possible.

1. At remote installations where POVs are not available, all alcoholic beverages may be sold. AR 215-1, para. 7-7c(1).
2. If installation is located within 50 miles or 1-hour driving time from a state or international border with a lower drinking age. Sole consideration is the motor vehicle safety of the community. AR 215-1, para. 7-7c(2).

3. Special occasions under controlled conditions in order to foster camaraderie and friendship in a military environment. Must be approved by a general officer. AR 215-1, para. 7-7c(3).
  4. Exceptions only apply to soldiers. AR 215-1, para. 7-7e.
  5. State law does not affect “nonalcoholic” drinks (containing less than one-half of one percent alcohol), even if the state classifies them as alcoholic. AR 215-1, para. 7-7d.
- C. Off Post. No activity may provide alcohol for off-post catered functions. Outside U.S., MACOMs will determine. AR 215-1, para. 7-10c.
- D. Purchase of Alcohol. AR 215-1, para. 7-12.
1. In U.S., distilled spirits may be purchased from any source. Malt beverage and wine must be purchased in state. Exception: In Alaska and Hawaii, all alcohol purchases must be made within the state. AR 215-1, para. 7-12b.
  2. Outside U.S., MACOMs decide policy consistent with treaties and agreements. AR 215-1, para. 7-12a.
  3. As instrumentalities of the United States, NAF are exempt from state and local taxes. AR 215-1, paras. 3-1b(2) and 3-13. But they must pay federal wholesaler or retailer taxes. AR 215-1, para. 3-10.

## **IX. CONCLUSION.**

## INFORMATION PAPER

CFSC-JA  
18 August 1998

SUBJECT: Transitional Compensation

1. Purpose. To provide information concerning transitional compensation for abused dependents.
2. Discussion.

a. In May 1995, DODI 1342.24, Subject: Transitional Compensation for Abused Dependents, was published, implementing 10 U.S.C. 1059, relating to transitional compensation to dependents of members separated for dependent abuse.

b. DODI 1342.24, applies to dependents of members of the Armed Forces who have been on active duty for more than 30 days and who on or after November 30, 1993, have been separated from active duty under a court-martial sentence resulting from a dependent-abuse offense; or administratively separated from active duty if the basis for separation includes a dependent-abuse offense.

c. Compensation is made at the same rate as for Dependency and Indemnity Compensation (38 U.S.C. 1311(a)(1)), and payments range from 12 to 36 months depending on the member's ETS date at the time of the court-martial or administrative separation.

d. DODI 1342.24 contains provisions for the amount, commencement and duration of payments, recipients of payments, and provisions for cessation of payments, to include remarriage by the spouse, cohabitation with the member, and active participation by the spouse in the conduct constituting the abuse. It also provides for commissary and exchange benefits and medical benefits.

e. It is important that this information be supplied to the field so that dependents of members who are court-martialed or separated for dependent-abuse offenses are aware of their right to these entitlements.

O'Malley A. Pitcher/DSN 761-7460



# Administrative and Civil Law Department

## Basic Course Deskbook

### CHAPTER J

#### COMMAND INVESTIGATIONS UP AR 15-6

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## ADMINISTRATIVE INVESTIGATIONS

*I believe that the role of the commander's legal advisor is to ensure that the process of gathering facts, of advising on the correct standards for evaluating those facts, and for ensuring the correct application of those standards, is professionally and thoroughly accomplished. Why is this important? I only state the obvious when I tell this audience that we, as lawyers, are expected to get it right. This does not mean a result that is necessarily immune from public criticism, for such criticism is bound to come from some quarter. It means a result that will withstand critical, objective scrutiny.*

**Ms. Judith Miller, Former General Counsel, U.S. Department of Defense, Federal Bar Association Speech, 8 April 1997**

**I. AR 15-6 INVESTIGATIONS.** AR 15-6, Procedure For Investigating Officers And Boards Of Officers (11 May 88, w/ch1, 30 Sep 96)

- A. FUNCTION: to ascertain facts, make recommendations and report them to the appointing authority
- B. APPLICABILITY: investigations or boards appointed under a specific regulation or directive (e.g., AR 635-200) may make AR 15-6 applicable. In case of conflicting provision, the more specific regulation overrules AR 15-6. Even when not specifically applicable, AR 15-6 may be used a guide but its provisions would not be binding.



C. TYPES: FORMAL OR INFORMAL

1. Formal:

- a) Generally used to provide a hearing; extensive due process rights: include president with voting members, recorder, notice to respondent with right to counsel, challenges for cause, entitlement to be present at all open sessions, put on evidence, cross-examine witnesses, make argument.
- b) Example: An administrative separation board conducted UP AR 635-200 is also a formal AR 15-6.

2. Informal:

- a) May be used to investigate individual conduct. Para 1-6: “The fact that an individual may have an interest in the matter under investigation or that the information may reflect adversely on that individual does not require that the proceedings constitute a hearing for that individual.” Para 1-4b(2): Even if the purpose of the investigation is to inquire into the conduct or performance of a particular individual, formal procedures not mandatory unless required by other regulations or by higher authority.
- b) Great flexibility: one IO, proceedings not open to public, statements taken at informal sessions, no right to counsel unless required by Art 31(b), UCMJ; no right to cross-examine, etc.

D. APPOINTING AN INFORMAL 15-6

- 1. Authority: Includes a commander at any level or a principal staff officer or supervisor in grade of major or above. Change 1 authorizes GS-14 agency head or division chief to appoint either formal or informal. Appropriate appointing authority can ratify.

2. Method: May be oral but not recommended; written memorandum of appointment preferred. Should specify purpose and scope of investigation and nature of findings and recommendations required. [Model appointment memorandum at Appendix A.] The appointment directive is important. You should work with your Judge Advocate in drafting it.
3. Who should be the Investigating Officer? Break the Duty Roster Mindset!
  - a) Commissioned/Warrant Officer/GS-13, senior to soldier whose conduct is under investigation; **best qualified** by reason of education, training, experience, length of service and temperament.
  - b) Change 1 requires IO to **consult with OSJA for legal guidance before beginning informal investigation**. IO should continue to consult with OSJA during the entire investigation process, including the development of findings and recommendations.

E. SPECIAL CASES:

1. Only a GCMCA can appoint AR 15-6 if:
  - a) Property damage of \$1M or more;
  - b) Loss or destruction of Army aircraft or missile;
  - c) Injury or illness likely to result in death or permanent total disability.
2. Investigation into fratricide/friendly fire incident forwarded after action to next higher Army HQs for review.
3. Special requirements for Military Whistleblower Protection Act cases, at AR 600-20 (15 Jul 99), paras. 5-8 and 5-12.
4. Special reporting and processing requirements for Sex Harassment cases, at AR 600-20 (15 Jul 99), Appendix E.

F. CONDUCTING THE INVESTIGATION

1. The investigating officer should immediately set a briefing with the advising Judge Advocate officer for the command to understand the rules and legal concerns for AR 15-6 investigations and to set up an investigation plan. Make sure the Investigating Officer gets an Investigating Officer Handbook with checklist [Appendix B].
2. Investigation Plan.
  - a) Purpose of the Investigation. What is the timeline? See Appointment Memorandum.
  - b) Facts Known
  - c) Potential Witnesses
  - d) Physical and Documentary Evidence
  - e) Possible Criminal or Counter-Intelligence implications? Article 31 warnings?
  - f) Any civilian employees as witnesses? Weingarten rights.
  - g) Regulations and Laws involved
  - h) Order of interviewing witnesses
  - i) Chronology

G. FINDINGS AND RECOMMENDATIONS

1. Findings

- a) Clear concise statement of fact readily deduced from evidence in record. Includes negative findings. Should not exceed scope of appointment. Should refer back to evidence gathered in the investigation such as Statement of LTC \_\_\_, or Photograph 1 at TAB C.
  - b) Standard is preponderance of evidence: more likely than not; greater weight of evidence than supports a contrary conclusion. Weight not determined by number of witnesses but by considering all evidence and factors such as demeanor, opportunity for knowledge, information possessed, ability to recall and relate events, other indications of credibility.
  - c) Investigating Officer should work with JAG advisor to develop the findings based upon the record of investigation facts and the commander's appointment memorandum.
2. Recommendations Consistent with findings. Can be negative, e.g., no further action taken. Make sure they make sense and are supported by the record of investigation. Beware of making mental health evaluation recommendations without evidence in the ROI. See Appendix C, Military Mental Health Evaluation Protection Act.

## H. ACTION BY APPOINTING AUTHORITY

- 1. Options:
  - a) Approve as is.
  - b) Disapprove, and/or return for additional investigation. May consider all relevant information, even information not considered by IO. Unless otherwise provided by another directive, appointing authority is not bound by findings or recommendations; may take action less favorable than recommended.
  - c) Substitute Findings and Recommendations.

2. Legal review before action recommended. Not the same attorney that advised the investigating officer. Required in serious or complex cases:

- a) Incident being investigated resulted in death or serious bodily injury;
- b) Where findings & recommendations may result in adverse administrative action or will be relied upon by higher HQs.

#### I. ADVERSE ADMINISTRATIVE ACTION

1. No adverse administrative action may be taken by a commander based upon an informal AR 15-6 investigation until:

- a) **Notice** is given to the subject of the investigation of the allegations against them. The subject is given a copy of the investigation subject to any redactions required.
- b) The subject is given a **reasonable opportunity to rebut** the allegations.
- c) The **Commander must consider the subject's rebuttal** to the investigation, if submitted in a timely manner, **before taking any adverse action**.

2. The federal courts have routinely upheld adverse administrative actions (based upon AR 15-6 investigation) taken against military members as long as the subject received notice, a chance to rebut the allegations, and command consideration of the rebuttal prior to the adverse action taking place.

#### J. CRITICISMS OF AR 15-6 INVESTIGATION PROCESS

1. Subject to abuse: Appearance of whitewash when trying to keep “in-house,” e.g., if used when criminal investigation is more appropriate or too junior of investigating officer appointed. Consider asking appropriate law enforcement authorities if they will investigate, and memorializing the response

2. Subject to command influence, even unintentional (“signal reading” by IO). Consider requesting services of an IO outside the command.
3. Lack of IO training and experience: Junior officers appointed. Little guidance on “how to.” To overcome this weakness, establish compliance with AR 15-6 Change one requirements; IO hand-picked as best qualified, coordination with JAG now required for informal investigations. Ensure IO receives OTJAG Investigation Guide for Informal Investigations or local equivalent.
4. Fewer protections for subjects of informal investigation:
  - a) Failure to inform of why under investigation.
  - b) Failure to provide Art 31 rights.
  - c) Improper collection of evidence.
  - d) No “exclusionary rule” for abuses in investigative process.

AR 15-6 due process requirements are minimum; consider offering more.

## **II. OTHER TYPES OF COMMAND INQUIRIES**

- A. OERs (AR 623-105, para 6-3); NCOERs (AR 623-205, para 1-4, 2-15). When OER/NCOER by subordinate or member of subordinate command may be illegal, unjust, or otherwise violate regulation. Confined to matters relating to clarity of report, its facts, compliance with regulation, and conduct of rated soldier and members of rating chain.
  1. As formal or informal as commander thinks appropriate to include telephone and personal discussions. Not an AR 15-6 investigation generally.

2. Inquiry by commander in chain of command above designated rating officials involved in allegations. NCOER: commander (major or above); may appoint an officer senior to designated rating officials involved in allegations to make inquiry.
3. Primary purpose to provide greater degree of command involvement in preventing injustices and errors before they become a matter of permanent record. May also occur after report is accepted at DA but not intended to substitute for appeal.

B. R.C.M. 303 Preliminary Inquiry (Criminal).

1. Normally this inquiry will consist of review of alleged charges and MPI/CID report of investigation. Not the same as an Article 32 (UCMJ) investigation. Should gather all reasonably available evidence on:
  - a) Guilt or innocence
  - b) Aggravation
  - c) Extenuation and Mitigation.
2. In serious or complex cases, commanders should consult with law enforcement personnel to conduct the inquiry or investigation.
3. A person who is an "accuser" under Article 1(9), UCMJ, may not convene a special or general courts-martial [R.C.M. 504(c)(1)]. Any commander who is a special or general courts-martial convening authority should appoint another officer in the command to conduct the preliminary inquiry and prefer charges, if necessary.

C. Examination into Article 138 complaint. Art. 138, UCMJ; AR 27-10, chapter 20. GCMCA examines complaint submitted by soldier UP AR 27-10 for any act or omission by a commander that soldier believes to be wrong and for which redress has been requested and refused. Examination may be delegated but not to subordinate of respondent in chain of command and not to person junior in grade. Delegated examinations conducted UP AR 15-6.

D. Safety & Collateral Investigations-Accidents. AR 385-40.

1. Safety Investigations. The sole purpose is to prevent future accidents. Safety investigations are oriented at discovering what caused accident, e.g., equipment failure, pilot error, or weather conditions. Required for all flight and fratricide/friendly fire accidents. Authorized in other complex accident cases. Safety investigations have priority over collateral investigations. AR 385-40, para. 1-8. Safety investigation results cannot be used as the basis for adverse administrative action or UCMJ action. Safety investigation reports are not to be enclosed or incorporated into any non-safety investigation, including collateral investigations of the same incident. Information gathered from such investigations has restricted release requirements IAW AR 385-40, para. 1.10.
2. Collateral Accident Investigation. AR 385-40, para. 1-8. Such investigations can be used as the basis for adverse administrative action or UCMJ action. Such investigations often parallel safety investigation facts. Investigators must work with JAG advisor on getting facts, e.g., names of witnesses (but not witness statements), physical evidence from safety investigation team. Safety Board experts not to give opinions of what caused accident to collateral investigators, just factual information. No requirement to follow AR 15-6 procedures, but a good idea.

E. EO Investigations (AR 600-20, Appendix E). Equal opportunity investigations can be a source for criminal or adverse administrative action. Procedurally, most EO investigations follow the format of AR 15-6. Special requirements as to processing times and reports exist, UP 10 U.S.C. section 1561.

F. Reports of Survey (AR 735-5). AR 15-6 or collateral accident investigation may be used as substitute for ROS investigation. Survey officers are not required to follow AR 15-6 informal investigation procedures. Survey reports are recorded upon a DA Form 4697, Report of Survey Form. The regulation provides guidance to commanders that survey officers should be senior in rank to the person subject to possible financial liability. Unlike AR 15-6, a survey investigating officer may be an NCO (E-7 or above). Like AR 15-6 informal investigations, for a report of survey to pass legal sufficiency the person subject to financial liability must be given notice of the allegations of negligence, the right to rebut the survey findings in a reasonable period, and to have the rebuttal considered prior to assessing financial liability. A Survey Officer's Guide has been developed by the Army, as DA Pam 735-5 (10 March 1997).



### III. **INSPECTOR GENERAL INVESTIGATIONS.** AR 20-1, INSPECTOR GENERAL ACTIVITIES AND PROCEDURES, 16 APRIL 2001.

- A. IGs should not normally investigate when substantiation of allegations likely to establish criminal misconduct or likely to result in adverse action against individual. Two forms of investigative mechanisms:
1. Investigative inquiries: informal fact-finding process to gather information needed to resolve allegations or issues when investigative techniques are appropriate but circumstances do not merit an IG investigation. Inquiries conducted into “improprieties.” If inquiry develops evidence to substantiate as misconduct, inquiry ends---matter may be referred to CID, or commander may appoint AR 15-6 investigation, or, in rare instances, may become an IG investigation. Only substantiated inquiries need to have a written legal review.
  2. Investigations: fact-finding examination by detailed IG into allegations, issues, or adverse conditions to provide the directing authority a sound basis for decisions and actions. Normally address allegations of wrongdoing by an individual. IG must obtain written directive by appointing authority. Written legal review required. Verbal notification required of the commander/supervisor of nature of allegations against the subject/suspect, and verbal notification of the results to commander/supervisor. Should not contain recommendations for adverse action against suspect/subject.
  3. What sort of issues are good issues for IG investigations?
    - a) Dereliction of Duty (Non-UCMJ Action)
    - b) Regulatory violations--systematic command problems
    - c) Ethics violations (JER)
    - d) Conduct Unbecoming An Officer (Non-UCMJ Action)

- B. Benefits: trained, thorough investigators; keeps matter in-house, at least to start with; may otherwise have problem designating good, sufficiently senior AR 15-6 IO who can take the necessary time. Disadvantages: restrictions on release; cannot use evidence for adverse action without TIG authorization; may be necessary to duplicate IG work with AR 15-6 to obtain usable evidence.
- C. Problem: IG investigations and inquiries being used for purposes not originally intended when HQDA command and promotion boards review candidates for suitability. IG records are available within DA for those having need for the record "in the official performance of their duties." AR 20-1, para. 3-6.
- D. Special reporting and investigating requirements for allegations against General Officers, SES civilians, and Field Grade and Senior Enlisted (E-7 and above) soldiers.
1. Allegations of misconduct or impropriety against General Officers or SES civilians must be forwarded to DAIG. Local investigation will not take place without specific authorization from DAIG.
  2. All allegations against such senior personnel, whether eventually substantiated or nonsubstantiated, are maintained in database, for use during background checks. New regulation extends this requirement to MAJ-COL and E-7-E-9: All IG allegations must be reported to DAIG (para. 1-4b(5)(b)). The information will be used whenever senior Army leadership deems necessary (para. 4-6c.) For example, COL selection boards must undergo a post-board IG record screening (AR 600-8-29, para. 8-2).
  3. Adverse comments: If unfavorable information obtained which may result in adverse comment in ROI and individual not informed of unfavorable information during investigation, IG will advise of substance before investigation completed and provide opportunity to comment on unfavorable information.
  4. Problem: May an individual receive a Memorandum of Reprimand based upon a DAIG Investigation (ROI)? Yes. Such use must be authorized by the SA, US of A, CSA, VCSA, or TIG. AR 20-1, para. 3-3. That paragraph also describes due process rights in such cases.

#### **IV. CONCLUSION.**



## **APPENDIX A**

### **Sample AR 15-6 Informal Investigation Appointment Memorandum**



S: 25 March 1999

AFVA-JA (15-6)  
1999

15 March

MEMORANDUM FOR: MAJ Frederick Factfinder, DISCOM Plans Officer, 46<sup>th</sup> Infantry Division (M), Fort Wahoo, Virginia 22330

SUBJECT: Investigating Officer Appointment, G Company, 123d Forward Support Battalion Sex Harassment Complaint

1. Appointment. You are hereby appointed an investigating officer pursuant to Army Regulation (AR)15-6, Procedure for Investigating Officers and Boards of Officers, and Army Regulation 600-20, Command Policy, Chapter 6 (Equal Opportunity Program in the Army), to conduct an informal investigation into allegations of gender bias, and unfair treatment of female soldiers as to promotions and extra duty. A copy of anonymous 6-Boss line message received on 8 March 1999 is enclosed. This investigation is your primary duty and takes precedence over all other duties assigned.

2. Legal Orientation. Before you begin your investigation, you must receive a briefing from the Office of the Staff Judge Advocate, Administrative Law Section. Captain Cheever J. Loophole is your legal advisor. You must have your legal briefing completed no later than 17 March 1999. Call 287-9426 to schedule an appointment. You will consult with Captain Loophole regarding all aspects of this investigation, including developing an investigation plan, determining whether witnesses need to be advised of their rights under the UCMJ, Article 31 or the Fifth Amendment, special procedures for interviewing Department of the Army civilian employees, and preparing findings and recommendations. Captain Loophole will provide you with a 46<sup>th</sup> Division Investigating Officer's Guide and several forms and regulations necessary for you to complete your investigation.

3. Procedures. You are to conduct this investigation using the informal procedures outlined in Chapter 4, AR 15-6. No individual has been named as a respondent at this time. All witnesses will be sworn prior to their interview. You are to thoroughly document all witness interviews in writing, preferably on a DA Form 2823 (Sworn Statement). You will interview all witnesses in person, if practical. If in the course of your investigation you come to suspect that certain people may have committed criminal conduct, you must advise them of their rights under Article 31, UCMJ, or the Fifth Amendment, U.S. Constitution, as appropriate. Witness waivers of their Article 31 or Fifth Amendment rights will be documented on a DA Form 3881 (Rights Warning Procedure/Waiver Certificate). In addition, you may need to provide a witness with a Privacy Act statement before you solicit any information. You are to maintain a daily written chronology of your actions on this investigation. You are strongly encouraged to consult your legal advisor if you have any questions regarding these procedures.

4. Report of Investigation. The report of investigation must include, but is not limited to, findings on the following issues:

a. Whether the G Company, 123d FSB chain of command fairly treats its female soldiers, including if any member of the chain of command has violated any regulations, laws or command policies in its treatment of female soldiers. You must designate which regulations, laws and/or command policies were violated, if any.

b. Whether any female members of G Company, 123d FSB, were subjected to any form of sexual harassment by the chain of command or non-commissioned officers in violation of federal law and AR 600-20, chapter 6, in the past twelve months. Provide specific examples of any such harassment, if it exists within G Company. If you find any incidents of sexual harassment, you must immediately contact your legal advisor and my office, so that this information may be reported pursuant to federal law.

c. Whether any female members of G Company, 123 FSB, were unfairly denied promotion opportunities IAW AR 600-8-19, Enlisted Promotions and Reductions, and the equal opportunity policy of AR 600-20, Change 4, paragraph 6-3 in the past twelve months. Give concrete examples, if you find such conduct.

d. Whether any female members of G Company, 123 FSB, were unfairly assigned extra duties in the past twelve months. You will examine whether the duty roster is run in accordance with AR 220-45; Duty Rosters; whether any assigned "extra training" is conducted in compliance with AR 600-20, paragraph 4-6, and AR 27-10, Military Justice, paragraph 3-3c; and whether any "extra duty" assigned as nonjudicial (Article 15) punishment complies with AR 27-10, paragraph 3-19(b)(5). Give concrete examples, if you find such conduct.

e. Determine if the G Company, 123 FSB officers and noncommissioned officers have exhibited improper attitudes and/or conduct towards female soldiers in the command. Give concrete examples, if you find such conduct.

Provide me with recommendations to resolve any issues or problems raised by your findings. You will consult with your legal advisor in developing your findings and recommendations. Submit your findings and recommendations on a DA Form 1574 (Report of Proceedings by an Investigating Officer/Board of Officers) to the Brigade S-1 no later than 25 March. Submit any requests for modification of this suspense or the scope of your investigation to me, through your legal advisor.

5. Expert Assistance. You should consult with the 123 FSB Equal Opportunity Advisor, and the 46<sup>th</sup> Division Equal Opportunity Officer in determining whether gender bias exists in G Company, 123 FSB.

6. Criminal Misconduct. If you determine through your investigation that possible criminal conduct has occurred, immediately notify your legal advisor before proceeding any further with your investigation.

PAUL E. BRAVEHEART  
COL, AR  
Commanding



**APPENDIX B**

**OTJAG**

**Investigating Officer Handbook**



**ARMY REGULATION 15-6**

**INVESTIGATION GUIDE**

**FOR**

**INFORMAL INVESTIGATIONS**

**JANUARY, 1997**

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## INTRODUCTION

### 1. PURPOSE:

a. This guide is intended to assist investigating officers, who have been appointed under the provisions of Army Regulation (AR) 15-6, in conducting timely, thorough, and legally sufficient investigations. It is designed specifically for informal investigations, but some provisions are applicable to formal investigations. It may also be used by legal advisors responsible for advising investigating officers. A brief checklist is included at the end of the guide as an enclosure. The checklist is designed as a quick reference to be consulted during each stage of the investigation. The questions in the checklist will ensure that the investigating officer has covered all the basic elements necessary for a sound investigation.

b. This guide includes the changes implemented by Change 1 to AR 15-6. Many of those changes are significant; consequently, the information in the guide based on the changes is italicized.

### 2. DUTIES OF AN INVESTIGATING OFFICER: The primary duties of an investigating officer are:

- a. to ascertain and consider the evidence on all sides of an issue,
- b. to be thorough and impartial,
- c. to make findings and recommendations warranted by the facts and comply with the instructions of the appointing authority, and
- d. to report the findings and recommendations to the appointing authority.

### 3. AUTHORITY:

a. AR 15-6 sets forth procedures for the conduct of informal and formal investigations. Only informal investigations will be discussed here. Informal investigations are those that usually have a single investigating officer who conducts interviews and collects evidence. In contrast, formal investigations normally involve due process hearings for a designated respondent. Formal procedures are required whenever a respondent is designated.

b. Informal procedures are not intended to provide a hearing for persons who may have an interest in the subject of the investigation. Since no respondents are designated in informal procedures, no one is entitled to the rights of a respondent, such as notice of the proceedings, an opportunity to participate, representation by counsel, or the right to call and cross-examine witnesses. The investigating officer may, however, make any relevant findings or recommendations concerning individuals, even where those findings or recommendations are adverse to the individual or individuals concerned.

c. AR 15-6 is used as the basis for many investigations requiring the detailed gathering and analyzing of facts, and the making of recommendations based on those facts. AR 15-6 procedures may be used on their own, such as in an investigation to determine facts and circumstances, or the procedures may be incorporated by reference into directives governing specific types of investigations, such as reports of survey and line of duty investigations. If such directives contain guidance that is more specific than that set forth in AR 15-6 or these procedures, the more specific guidance will control. For example, AR 15-6 does not contain time limits for completion of investigations; however, if another directive that incorporates AR 15-6 procedures contains time limits, that requirement will apply.

d. Only commissioned officers, warrant officers, or *DA civilian employees paid under the General Schedule, Level 13 (GS 13), or above* may be investigating officers. The investigating officer must also be senior to any person that is part of the investigation if the investigation may require the investigating officer to make adverse findings or recommendations against that person. Since the results of any investigation may have a significant impact on policies, procedures, or careers of government personnel, *the appointing authority should select the best qualified person for the duty based on their education, training, experience, length of service, and temperament.*

## **PRELIMINARY MATTERS**

### **1. Appointing authority.**

a. Under AR 15-6, the following persons may appoint investigating officers for informal investigations:

- any general court-martial convening authority, including those who have such authority for administrative purposes only,

- any general officer,

- a commander at any level,

- a principal staff officer or supervisor in the grade of major or above,

- any state adjutant general, and

- *a DA civilian supervisor paid under the Executive Schedule, SES, or GS/GM 14 or above, provided the supervisor is the head of an agency or activity or the chief of a division or department.*

b. *Only a general court-martial convening authority may appoint an investigation for incidents resulting in property damage of \$1,000,000, the loss or destruction of an Army aircraft or missile, an injury or illness resulting in, or likely to result in, total disability, or the death of one or more persons.*

**2. Appointment procedures.** Informal investigation appointments may be made orally or in writing. If written, the appointment orders are usually issued as a memorandum signed by the appointing authority or by a subordinate with the appropriate authority line. Whether oral or written, the appointment should specify clearly the purpose and scope of the investigation and the nature of the findings and recommendations required. If the orders are unclear, the investigating officer should seek clarification. The primary purpose of an investigation is to report on matters that the appointing authority has designated for inquiry. The appointment orders may also contain specific guidance from the appointing authority, which, even though not required by AR 15-6, nevertheless must be followed. For example, AR 15-6 does not require that witness statements be sworn for informal investigations; however, if the appointing authority requires this, all witness statements must be sworn.

**3. Obtaining assistance.** The servicing Judge Advocate office can provide assistance to an investigating officer at the beginning of and at any time during the investigation. Investigating officers should always seek legal advice as soon as possible after they are informed of this duty and as often as needed while conducting the investigation. In serious or complex investigations for which a legal review is mandatory, this requirement should be included in the appointment letter. Early coordination with the legal advisor will allow problems to be resolved before they are identified in the mandatory legal review. The legal advisor can assist an investigating officer in framing the issues, identifying the information required, planning the investigation, and interpreting and analyzing the information obtained. The attorney's role, however, is to provide legal advice and assistance, not to conduct the investigation or substitute his or her judgment for that of the investigating officer. NOTE: *Complex and sensitive cases include*

*those involving a death or serious bodily injury, those in which findings and recommendations may result in adverse administrative action, and those that will be relied upon in actions by higher headquarters.*

**4. Administrative matters.** As soon as the investigating officer receives appointing orders, he or she should begin a chronology showing the date, time, and a short description of everything done in connection with the investigation. The chronology should begin with the date orders are received, whether verbal or written. Investigating officers should also record the reason for any unusual delays in processing the case, such as the absence of witnesses due to a field training exercise. The chronology should be part of the final case file.

**5. Concurrent investigations.** *An informal investigation may be conducted before, concurrently with, or after an investigation into the same or related matters by another command or agency. Appointing authorities and investigating officers must ensure that investigations do not hinder or interfere with criminal investigations or investigations directed by higher headquarters. In cases of concurrent investigations, investigating officers should coordinate with the other command or agency to avoid duplication of effort wherever possible. If available, the results of other investigations may be incorporated into the AR 15-6 investigation and considered by the investigating officer. Additionally, an investigating officer should immediately coordinate with the legal advisor if he or she discovers evidence of serious criminal misconduct.*

## CONDUCTING THE INVESTIGATION

### 1. Developing an investigative plan.

a. The investigating officer's primary duty is to gather evidence, and make findings of fact and appropriate recommendations to the appointing authority. Before obtaining information, however, the investigating officer should develop an investigative plan that consists of (1) an understanding of the facts required to reach a conclusion, and (2) a strategy for obtaining evidence. This should include a list of potential witnesses and a plan for when each witness will be interviewed. The order in which witnesses are interviewed may be important. An effective, efficient method is to interview principal witnesses last. This best prepares the investigating officer to ask all relevant questions and minimizes the need to re-interview these critical witnesses. As the investigation proceeds, it may be necessary to review and modify the investigative plan.

b. The investigating officer should begin the investigation by identifying the information already available, and determining what additional information will be required before findings and recommendations may be made to the appointing authority. An important part of this is establishing the appropriate standards, rules, or procedures that govern the circumstances under investigation. The legal advisor or other functional expert can assist the investigating officer in determining the information that will be required.

### 2. Obtaining documentary and physical evidence.

a. The investigating officer may need to collect documentary and physical evidence such as applicable regulations, existing witness statements, accident or police reports, and photographs. This information can save valuable time and effort. Accordingly, the investigating officer should obtain this information at the beginning of the investigation. In some cases, the information will not be readily available, so the request should be made early so the investigating officer may continue to work on other aspects of the investigation while the request is being processed. The investigating officer should, if possible and appropriate, personally inspect the location of the events being investigated and take photographs, if they will assist the appointing authority.

b. A recurring problem that must be avoided is lack of documentation in investigations with findings of no fault, no loss, or no wrongdoing. It is just as important to back these findings up with documentary evidence as it is to document adverse findings. All too frequently an investigating officer who makes a finding of no fault, no loss, or no wrongdoing, closes the investigation with little or no documentation. This is incorrect. The report of

investigation must include sufficient documentation to convince the appointing authority and others who may review the investigation that the finding of no fault, no loss, or no wrongdoing is supported by the evidence.

### **3. Obtaining witness testimony.**

a. In most cases, witness testimony will be required. Clearly, the best interviews occur face-to-face; but, if necessary, interviews may be conducted by telephone or mail. Because of the preference for face-to-face interviews, telephone and mail interviews should be used only in unusual circumstances. Information obtained telephonically should be documented in a memorandum for record.

b. Witness statements should be taken on DA Form 2823. Legible handwritten statements and/or questions and answers are ordinarily sufficient. If the witness testimony involves technical terms that are not generally known outside the witness's field of expertise, the witness should be asked to define the terms the first time they are used.

c. Although AR 15-6 does not require that statements be sworn for informal investigations, the appointing authority, or other applicable regulation, may require sworn statements, or the investigating officer may, at his or her own discretion, ask for sworn statements, even where not specifically required. Under Article 136, UCMJ, military officers are authorized to administer the oath required to provide a sworn statement; 5 U.S.C. 303 provides this authority for civilian employees. (Statements taken out of the presence of the investigating officer may be sworn before an official authorized to administer oaths at the witness's location.)

d. Investigating officers do not have the authority to subpoena witnesses, and their authority to interview civilian employees may be subject to certain limitations. Prior to interviewing civilians, the investigating officer should discuss this matter with the local Labor Counselor. Commanders and supervisors, however, have the authority to order military personnel and to direct Federal employees to appear and testify. Civilian witnesses who are not Federal employees may agree to appear, and, if necessary, be issued invitational travel orders. This authority should be used only if the information cannot be otherwise obtained and only after coordinating with the legal advisor or appointing authority.

### **4. Rights Advisement.**

a. All soldiers suspected of criminal misconduct must first be advised of their rights. DA Form 3881 should be used to record that the witness understands his or her rights and elects to waive those rights and make a statement. It may be necessary to provide the rights warning at the outset of the interview. In some cases, however, an investigating officer will become aware of the witness's involvement in criminal activity only after the interview has started and incriminating evidence is uncovered. In such case, rights warnings must be provided as soon as the investigating officer suspects that a witness may have been involved in criminal activity. If a witness elects to assert his or her rights and requests an attorney, all questioning must cease immediately. Questioning may only resume in the presence of the witness's attorney, if the witness consents to being interviewed.

b. Note that these rights apply only to information that might be used to incriminate the witness. They cannot be invoked to avoid questioning on matters that do not involve violations of criminal law. Finally, these rights may be asserted only by the individual who would be accused of the crime. The rights cannot be asserted to avoid incriminating other individuals. The following example highlights this distinction.

c. Example: A witness who is suspected of stealing government property must be advised of his or her rights prior to being interviewed. However, if a witness merely is being interviewed concerning lost or destroyed government property in connection with a Report of Survey, a rights warning would not be necessary unless evidence is developed that leads the investigating officer to believe the individual has committed a criminal offense. If it is clear that the witness did not steal the property but has information about who did, the witness may not assert rights on behalf of the other individual.

**5. Scheduling witness interviews.** The investigating officer will need to determine which witnesses should be interviewed and in what order. Often, information provided by one witness can raise issues that should be discussed



with another. Organizing the witness interviews will save time and effort that would otherwise be spent "backtracking" to re-interview prior witnesses concerning information provided by subsequent witnesses. While re-interviewing may be unavoidable in some circumstances, it should be kept to a minimum. The following suggests an approach to organizing witness interviews; it is not mandatory.

- When planning who to interview, work from the center of the issue outward. Identify the people who are likely to provide the best information. When conducting the interviews, start with witnesses that will provide all relevant background information and frame the issues. This will allow the interviews of key witnesses to be as complete as possible, avoiding the "backtracking" described above.

- Concentrate on those witnesses who would have the most direct knowledge about the events in question. Without unnecessarily disclosing the evidence obtained, attempt to seek information that would support or refute information already obtained from others. In closing an interview, it is appropriate to ask if the witness knows of any other persons who might have useful information or any other information the witness believes may be relevant to the inquiry.

- Any information that is relevant should be collected regardless of the source; however, investigating officers should collect the best information available from the most direct source.

- It may be necessary or advisable to interview experts having specialized understanding of the subject matter of the investigation.

- At some point, there will be no more witnesses available with relevant and useful information. It is not necessary to interview every member of a unit, for example, if only a few people have information relevant to the inquiry. Also, all relevant witnesses do not need to be interviewed if the facts are clearly established and not in dispute. However, the investigating officer must be careful not to prematurely terminate an investigation because a few witnesses give consistent testimony.

**6. Conducting witness interviews.** Before conducting witness interviews, investigating officers may consult Inspector General officials or law enforcement personnel such as Military Police officers or Criminal Investigation Division agents for guidance on interview techniques. The following suggestions may be helpful:

- Prepare for the interview. While there is no need to develop scripts for the witness interviews, investigating officers may wish to review the information required and prepare a list of questions or key issues to be covered. This will prevent the investigating officer from missing issues and will maximize the use of the officer's and witness's time. Generally, it is helpful to begin with open-ended questions such as "Can you tell me what happened?" After a general outline of events is developed, follow up with narrow, probing questions, such as "Did you see SGT X leave the bar before or after SGT Y?" Weaknesses or inconsistencies in testimony can generally be better explored once the general sequence of events has been provided.

- Ensure the witness's privacy. Investigating officers should conduct the interview in a place that will be free from interruptions and will permit the witness to speak candidly without fear of being overheard. Witnesses should not be subjected to improper questions, unnecessarily harsh and insulting treatment, or unnecessary inquiry into private affairs.

- Focus on relevant information. Unless precluded for some reason, the investigating officer should begin the interview by telling the witness about the subject matter of the investigation. Generally, any evidence that is relevant and useful to the investigation is permissible. The investigating officer should not permit the witness to get off track on other issues, no matter how important the subject may be to the witness. Information should be material and relevant to the matter being investigated. Relevancy depends on the circumstances in each case. Compare the following examples:

Example 1: In an investigation of a loss of government property, the witness's opinions concerning the company commander's leadership style normally would not be relevant.

Example 2: In an investigation of alleged sexual harassment in the unit, information on the commander's leadership style might be relevant.

Example 3: In an investigation of allegations that a commander has abused command authority, the witness's observation of the commander's leadership style would be highly relevant.

- Let the witness testify in his or her own words. Investigating officers must avoid coaching the witness or suggesting the existence or non-existence of material facts. After the testimony is completed, the investigating officer should assist the witness in preparing a written statement that includes all relevant information, and presents the testimony in a clear and logical fashion. Written testimony also should reflect the witness's own words and be natural. Stilted "police blotter" language is not helpful and detracts from the substance of the testimony. A tape recorder may be used, but the witness should be advised of its use. Additionally, the tape should be safeguarded, even after the investigation is completed.

- Protect the interview process. In appropriate cases, an investigating officer may direct witnesses not to discuss their statement or testimony with other witnesses or with persons who have no official interest in the proceedings until the investigation is complete. This precaution is recommended to eliminate possible influence on testimony of witnesses still to be heard. Witnesses, however, are not precluded from discussing matters with counsel.

**7. Rules of Evidence:** Because an AR 15-6 investigation is an administrative and not a judicial action, the rules of evidence normally used in court proceedings do not apply. Therefore, the evidence that may be used is limited by only a few rules.

- The information must be relevant and material to the matter or matters under investigation.

- Information obtained in violation of an individual's Article 31, UCMJ, or 5th Amendment rights may be used in administrative proceedings unless obtained by unlawful coercion or inducement likely to affect the truthfulness of the statement.

- The result of polygraph examinations may be used only with the subject's permission.

- Privileged communications between husband and wife, priest and penitent, attorney and client may not be considered, and present or former inspector general personnel will not be required to disclose the contents of inspector general reports, investigations, inspections, action requests, or other memoranda without appropriate approval.

- "Off-the-record" statements are not acceptable.

- An involuntary statement by a member of the Armed Forces regarding the origin, incurrence, or aggravation of a disease or injury may not be admitted.

The investigating officer should consult the legal advisor if he or she has any questions concerning the applicability of any of these rules.

**8. Standard of Proof.** Since an investigation is not a criminal proceeding, there is no requirement that facts and findings be proven beyond a reasonable doubt. Instead, unless another specific directive states otherwise, AR 15-6 provides that findings must be supported by "a greater weight of evidence than supports a contrary conclusion." That is, findings should be based on evidence which, after considering all evidence presented, points to a particular conclusion as being more credible and probable than any other conclusion.

## CONCLUDING THE INVESTIGATION

**1. Preparing Findings and Recommendations.** After all the evidence is collected, the investigating officer must review it and make findings. The investigating officer should consider the evidence thoroughly and impartially, and make findings of fact and recommendations that are supported by the facts and comply with the instructions of the appointing authority.

- Facts: To the extent possible, the investigating officer should fix dates, places, persons, and events, definitely and accurately. The investigating officer should be able to answer questions such as: What occurred? When did it occur? How did it occur? Who was involved, and to what extent? Exact descriptions and values of any property at issue in the investigation should be provided.

- Findings: A finding is a clear and concise statement that can be deduced from the evidence in the record. In developing findings, investigating officers are permitted to rely on the facts and any reasonable inferences that may be drawn from those facts. In stating findings, investigating officers should refer to the exhibit or exhibits relied upon in making each finding. Findings (including findings of no fault, no loss, or no wrongdoing) must be supported by the documented evidence that will become part of the report. Exhibits should be numbered in the order they are discussed in the findings.

- Recommendations: Recommendations should take the form of proposed courses of action consistent with the findings, such as disciplinary action, imposition of financial liability, or corrective action. Recommendations must be supported by the facts and consistent with the findings. Each recommendation should cite the specific findings that support the recommendation.

**2. Preparing the Submission to the Appointing Authority.** After developing the findings and recommendations, the investigating officer should complete DA Form 1574 and assemble the packet in the following order:

- appointing order,
- initial information collected,
- rights warning statements,
- chronology, and
- exhibits (with an index).

### **3. LEGAL REVIEW:**

a. AR 15-6 does not require that all informal investigations receive legal review. *The appointing authority, however, must get a legal review of all cases involving serious or complex matters, such as where the incident being investigated has resulted in death or serious bodily injury, or where the findings and recommendations may result in adverse administrative action, or will be relied on in actions by higher headquarters.* Nonetheless, appointing authorities are encouraged to obtain legal review of all investigations. Other specific directives may also require a legal review. Generally, the legal review will determine:

- whether the investigation complies with requirements in the appointing order and other legal requirements,

- the effects of any errors in the investigation,

- whether the findings (including findings of no fault, no loss, or no wrongdoing) and recommendations are supported by sufficient evidence, and

- whether the recommendations are consistent with the findings.

b. If a legal review is requested or required, it is required before the appointing authority approves the findings and recommendations. After receiving a completed AR 15-6 investigation, the appointing authority may approve, disapprove, or modify the findings and recommendations, or may direct further action, such as the taking of additional evidence, or making additional findings.

## **CHECKLIST FOR INVESTIGATING OFFICERS**

### **1. Preliminary Matters:**

a. Has the appointing authority appointed an appropriate investigating officer based on seniority, availability, experience, and expertise?

b. Does the appointment memorandum clearly state the purpose and scope of the investigation, the points of contact for assistance (if appropriate), and the nature of the findings and recommendations required?

c. Has the initial legal briefing been accomplished?

### **2. Investigative Plan.**

a. Does the investigative plan outline the background information that must be gathered, identify the witnesses who must be interviewed, and order the interviews in the most effective manner?

b. Does the plan identify witnesses no longer in the command and address alternative ways of interviewing them?

c. Does the plan identify information not immediately available and outline steps to quickly obtain the information?

### **3. Conducting the Investigation.**

a. Is the chronology being maintained in sufficient detail to identify causes for unusual delays?

b. Is the information collected (witness statements, MFR's of phone conversations, photographs, etc.) being retained and organized?

c. Is routine coordination with the legal advisor being accomplished?

### **4. Preparing Findings and Recommendations.**

a. Is the evidence assembled in a logical and coherent fashion?

b. Are the findings (including findings of no fault, no loss, or no wrongdoing) supported by the evidence? Does each finding cite the exhibits that support it?

c. Are the recommendations supported by the findings? Does each recommendation cite the findings that support it?

d. Are the findings and recommendations responsive to the tasking in the appointment memorandum?

e. Did the investigation address all the issues (including systemic breakdowns; failures in supervision, oversight, or leadership; program weaknesses; accountability for errors; and other relevant areas of inquiry) raised directly or indirectly by the appointment?

**5. Final Action.**

- a. Was an appropriate legal review conducted?
- b. Did the appointing authority approve the findings and recommendations? If not, have appropriate amendments been made and approved?
- c. Have the necessary taskers been prepared to implement the recommendations?



**CHAPTER K**  
**THE REPORT OF SURVEY SYSTEM**

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# **THE REPORT OF SURVEY SYSTEM**

## ***OUTLINE OF INSTRUCTION***

### **I. REFERENCES.**

- A. AR 735-5, Policies and Procedures for Property Accountability, 31 Jan. 1998.
- B. AR 600-4, Remission of Indebtedness for Enlisted Members, 1 Dec. 83.
- C. AR 15-185, Army Board for the Correction of Military Records, 29 Feb 00.
- D. AR 25-50, Preparing and Managing Correspondence, 5 Mar. 01.
- E. AR 15-6, Procedures for Investigating Officers and Boards of Officers, 30 Sep. 96
- F. DA Pam 735-5, Survey Officer's Guide, 1 Mar. 1997.
- G. DA Pam 710-5, Unit Commander's Supply Handbook, 15 April 1987.
- H. [www.usapa.army.mil](http://www.usapa.army.mil) (Official Army regulation and pamphlet website).

### **II. INTRODUCTION.**

- A. Applicability. AR 735-5 applies to all elements of the U.S. Army and to all U.S. Army property. While processing time and authority levels differ, the general substantive provisions apply equally to:
  - 1. Active Component.
  - 2. U.S. Army Reserve and National Guard.



3. Department of the Army (DA) Civilians.
- B. Purposes. AR 735-5, para. 13-1.
1. Document circumstances of loss, damage or destruction of Government property.
  2. Serve as a voucher for adjusting property books.
  3. Document a charge of or relief of financial liability.
- C. The report of survey or any other method used to enforce property accountability is not intended as corrective action or punishment. However, commanders are not precluded from using administrative or disciplinary measures if appropriate. AR 735-5, para. 12-1.

### **III. ALTERNATIVES TO REPORTS OF SURVEY.**

- A. Statement of Charges/Cash Collection Voucher when liability is admitted and the charge does not exceed one month's base pay. (These two functions have been combined in the new DD Form 362 which rescinds the independent DD Form 1131, Cash Collection Voucher.)
- B. Cash sales of hand tools and organizational clothing and individual equipment.
- C. Unit level commanders may adjust losses of durable hand tools up to \$100 per incident, if no negligence or misconduct is involved.
- D. Abandonment order may be used in combat, large- scale field exercises simulating combat, military advisor activities, or to meet other military requirements.
- E. Recovery of property unlawfully held by civilians is authorized — show proof it is U.S. property and do not breach the peace.

- F. AR 15-6 investigations and other collateral investigations can be used in conjunction with the DA Form 4687 as a substitute for report of survey investigations.
- G. If the **approving authority** determines that no negligence was involved in the damage to the property no report of survey is required. The approving authority assumes all responsibility for computation of charges and notification to the respondent.

#### IV. THE REPORT OF SURVEY SYSTEM (AR 735-5 CHPS. 13 AND 14).

- A. Initiating the Report of Survey.
  - 1. The Active Army will initiate and present reports of survey to the appointing or approving authority not later than **15 calendar days**. U.S. Army Reserve will initiate and present reports of survey to the appointing or approving authority not later than **75 calendar days** after the date of discovering the discrepancy. Army National Guard will initiate and present reports of survey to the appointing or approving authority not later than **45 calendar days** after date of discovering the discrepancy Active Army requirement of **15 calendar days**. 735-5, para. 13-7.
  - 2. The goal? A thorough investigation.
  - 3. A unit **must** initiate a report of survey when:
    - a. An individual refuses to admit liability and negligence or misconduct is suspected.
    - b. A higher authority or other DA regulation directs a report of survey.
    - c. A sensitive item is lost or destroyed.

- d. Property is lost by an outgoing accountable officer, unless voluntary reimbursement is made for the full value of the loss.
    - e. The amount of loss or damage exceeds an individual's monthly base pay, **even** if liability is admitted.
    - f. The damage to government quarters or furnishings exceeds one month's base pay.
    - g. The loss involves certain bulk petroleum products.
  - 4. Certain losses require an AR 15-6 investigation as the underlying investigative mechanism. A ROS DA Form 4697 will be completed as the adjustment document, but the appointing or approving authority will not conduct a separate Report of Survey investigation. These types of losses include:
    - a. Sensitive items.
    - b. Items enumerated in AR 190-11, app. E.
- B. Total processing time. Total processing time is computed by subtracting the approval date from the initiation date minus time used to notify respondent of rights. Under normal circumstances these time constraints are as follows:
- 1. The U.S. Army Reserve component: 240 days (8 months).
  - 2. The Army NG: 150 days (5 months).
  - 3. The Active Army Component: 75 days (2 1/2 months).
- C. Approval/Appointing Authority. AR 735-5, para. 13-16.

1. The approving authority is an Army officer, or DA civilian employee authorized to appoint a survey officer and to approve reports of survey “by authority of the Secretary of the Army.” The approving authority does not have to be a court-martial convening authority.
    - a. U.S. Army Active and Reserve Components. The minimum grade for an approval authority is LTC (O-5) or above, DA civilian in a supervisory position in the grade of GS-14 or above.
    - b. Army National Guard. The minimum grade for an approval authority is a federally recognized COL (O-6) commander.
  2. The appointing authority is an officer or civilian employee designated by the approving authority with responsibility for appointing report of survey investigating officers.
  3. Generally, a lieutenant colonel (05) commander is both appointing and approval authority.
  4. Retained Approval authority. When a Colonel (O-6)/ GS 15 or above retains approval authority, he or she may designate a Lieutenant Colonel (05) (or major in a lieutenant colonel billet) or DOD civilian employee in the grade of GS-13 (or a GS-12 in a GS-13 billet) or above as an appointing authority.
  5. Regardless of who initiates the report of survey, it is processed through the chain of command of the individual responsible for the property at the time of the incident, provided the individual is subject to AR 735-5. AR 735-5, para. 13-4.
- D. Survey Officer Qualifications. AR 735-5, para. 13-26.
1. The survey officer will be senior to the person subject to possible financial liability, “except when impractical due to military exigencies.”

2. The survey officer can be an Army commissioned officer; warrant officer; or enlisted soldier in the rank of Sergeant First Class (E-7), or higher; a civilian employee GS-07 or above; or a Wage Leader (WL) or Wage Supervisor (WS) employee. In joint commands or activities, any DOD commissioned or warrant officer or non-commissioned officer E-7 or above assigned to the activity or command can be the survey officer.
3. Consult AR 600-8-14, table 8-6 for the grade equivalency between military personnel and civilians employees.
4. The Survey officer's primary duty is the investigation.
  - a. The U.S. Army Reserve Component: **60 Calendar days** to complete investigation.
  - b. The Army National Guard: **60 Calendar days** to complete investigation
  - c. The Active Army Component: **30 Calendar days** to complete investigation.
5. The surveying officer **should** get a briefing from a judge advocate.

## V. VALUING THE LOSS.

### A. Types of Loss.

1. Loss. There are two types of losses which can result in financial liability:
  - a. Actual loss. Physical loss, damage or destruction of the property.
  - b. Loss of accountability. Due to loss circumstances, it is impossible to determine if there has been actual physical loss, damage, or destruction because it is impossible to account for the property.

2. The **actual value** at the time of the loss is the **preferred method** of valuing the loss. AR 735-5, App. B, para. B-2a.
  - a. Determine the item's condition item at the time of the loss or damage.
  - b. Determine a price value for similar property in similar condition sold in the commercial market within the last 6 months.
3. Depreciation.
  - a. **Least** preferred method of determining the loss to the government. AR 735-5, App. B, para. B-8.
  - b. Compute charges according to AR 735-5, App. B, para B-2b.
4. Limits on financial liability. AR 735-5, para. 13-39.
  - a. **General rule:** An individual will not be charged more than one month's base pay.
    - (1) Charge is based upon the soldier's base pay **at the time of the loss.**
    - (2) **For ARNG and USAR personnel, base pay is the amount they would receive if they were on active duty.**
    - (3) For civilian employees it is 1/12 of their annual salary.
  - b. **Exceptions** to the general rule. There are times when personnel are liable for the **full amount of the loss.** AR 735-5, para. 13-39a.

- (1) Any soldier is liable for the full loss to the Government (less depreciation) when they lose, damage, or destroy personal arms or equipment.
- (2) Any person is liable for the full loss of public funds.
- (3) Accountable officers will be liable for the full amount of the loss.
- (4) Any person assigned government quarters is liable for the full amount of the loss to the quarters, furnishings, or equipment as a result of **gross negligence or willful misconduct** of the responsible individual, his guests, dependents, or pets.

5. Collective Financial Liability: Two or more persons may be held liable for the same loss.

- (1) There is no comparative negligence.
- (2) Financial loss is apportioned according to AR 735-5, Table 12-4.
- (3) DO NOT use Table 12-4 if one of the collective liability respondents is not federally employed AR 735-5, para. 13-39d.
  - (a) Take the total number of respondents divide the total amount of the loss. This is the amount each respondent is liable for — subject to a one month's base pay cap for soldiers and civilian employees.

B. Involuntary Withholding of Current Pay.

- 1. Members of the armed forces may have charges involuntarily withheld. 37 U.S.C. § 1007.

2. Involuntary withholding for civilian employees. 5 U.S.C. § 5512, AR 37-1, Chapter 15.
3. No involuntary withholding for the loss of NATO property (DAJA-AL 1978/2184).
4. No involuntary withholding for the loss of MFO property.

## **VI. IMPOSING LIABILITY.**

### **A. Responsibility For Property AR 735-5, paras. 2-8 & 13-28, and figure 2-1.**

1. Command Responsibility.
  - a. The commander has an obligation to insure proper use, care, custody, and safekeeping of government property within his or her command.
  - b. Command responsibility is inherent in command and cannot be delegated. It is evidenced by assignment to command at any level.
2. Supervisory Responsibility.
  - a. The obligation of a supervisor for the proper use, care, and safekeeping of government property issued to, or used by, subordinates. It is inherent in all supervisory positions and not contingent upon signed receipts or responsibility statements.
  - b. If supervisory responsibility is involved, also consider the following factors.
    - (1) The nature and complexity of the activity and how it affected the ability to maintain close supervision.



- (2) The adequacy of supervisory measures used to monitor the activity of subordinates.
- (3) The extent supervisory duties were hampered by other duties or the lack of qualified assistants.

3. Direct Responsibility.

- a. The obligation to ensure the proper use, care, custody, and safekeeping of all government property for which the person has receipted.
- b. Direct responsibility is closely related to custodial responsibility (discussed below).

4. Custodial Responsibility.

- a. An individual's obligation regarding property in storage awaiting issue or turn-in to exercise reasonable and prudent actions to properly care for and ensure property custody and safekeeping of the property.
- b. Who has custodial responsibility? A supply sergeant, supply custodian, supply clerk, or warehouse person who is rated by and answerable directly to the accountable officer or the individual having direct responsibility for the property.
- c. Responsibilities include:
  - (1) Ensuring the security of all property stored within the supply room and storage annexes belonging to the supply room or SSA is adequate.
  - (2) Observing subordinates to ensure they properly care for and safeguard property.

(3) Enforcing security, safety and accounting requirements.

(4) If unable to enforce any of these, reporting the problems to their immediate supervisor.

5. Personal Responsibility.

a. An individual's obligation to properly use, care, and keep safe government property in their possession, with or without a receipt.

B. Negligence. AR 735-5, para. 13-28 b and App. C, para. C-10).

1. Simple negligence—the failure to act as a reasonably prudent person would have acted under similar circumstances.

a. Remember, a reasonably prudent person is an average person, not a perfect person. Also consider:

(1) What could be expected of the person considering their age, experience, and special qualifications?

(2) The type of responsibility involved.

(3) The type and nature of the property. More complex or sensitive property normally requires a greater degree of care.

**b. Examples of simple negligence.**

(1) Failure to do required maintenance checks.

(2) Leaving weapon leaning against a tree while attending to other duties.

(3) Driving too fast for road or weather conditions.

- (4) Failing to maintain proper hand receipts.
- 2. Gross negligence—an extreme departure from the course of action expected of a reasonably prudent person, all circumstances being considered, and accompanied by a reckless, deliberate, or wanton disregard for the foreseeable consequences of the act.
  - a. Reckless, deliberate, or wanton -
    - (1) These elements can be express or implied.
    - (2) Does not include thoughtlessness, inadvertence, or errors in judgment.
  - b. Foreseeable consequences.
    - (1) Does not require actual knowledge of actual results.
    - (2) Does not need to foresee the particular loss or damage that occurs, but must foresee that some loss or damage of a general nature may occur.
  - c. **Examples of gross negligence.**
    - (1) Soldier drives a vehicle at a speed in excess of 40 mph of the posted speed limit. Intentionally tries to make a sharp curve without slowing down.
    - (2) Soldier lives in family quarters and has a child who likes to play with matches. Soldier leaves matches out where child can reach them.
- 3. Willful misconduct—any intentional or unlawful act.
  - a. Willfulness can be express or implied.

- b. Includes violations of law and regulations such as theft and misappropriation of government property.
- c. A violation of law or regulation is not negligence *per se*.
- d. Examples of willful misconduct
- e. A violation of law or regulation is not negligence *per se*.
  - (1) Soldier throws a tear gas grenade into the mess tent to let the cooks know what he thought about breakfast, and as a result, the tent burns to the ground.
  - (2) Soldier steals a self-propelled howitzer, but he does not know how to operate it. Accordingly, his joy ride around post results in damage to several buildings.

C. Proximate cause—the cause which, in a natural and continuous sequence, unbroken by a new cause, produces the loss or damage, and without which the loss or damage would not have occurred. It is the primary moving cause, or the predominant cause, from which the injury follows as a natural, direct, and immediate consequence, and without which it would not have occurred.

- 1. The damage arises out of the original act of negligence or misconduct.
- 2. A continual flow or occurrence of events from the negligent act or misconduct.
- 3. Use common sense.
- 4. Examples of proximate cause.

- a. Soldier driving a vehicle fails to stop at a stop sign and strikes another vehicle after failing to look. Proximate cause is the soldier's failure to stop and look.
  - b. Soldier A illegally parks his vehicle in a no parking zone. Soldier B backs into A's vehicle. B did not check for obstructions to the rear of his vehicle. A's misconduct is not the proximate cause of the damage. Instead, B's negligent driving is the proximate cause.
5. Independent intervening cause—an act which interrupts the original flow of events or consequences of the original negligence. It may include an act of G-d, criminal misconduct, or negligence.

## **VII. RIGHTS OF THE RESPONDENT (AR 735-5, PARA. 13-40).**

### **A. General Information.**

- 1. When a survey officer recommends financial liability against an individual, that individual is called the Respondent.
- 2. The report of survey form (DA Form 4697) contains a rights notice.

### **B. Respondents' Rights. AR 735-5, paras. 13-32 and 13-33. (Survey Officer)**

- 1. The survey officer will notify the respondent by memorandum of the proposed recommendation of financial responsibility. The survey office will notify the respondent of the following:
  - a. The right to inspect and copy the report of investigation.
  - b. The right to obtain legal advice.
  - c. The right to submit a statement and other evidence in rebuttal to the recommendation

d. Time limits for submitting rebuttal evidence are as follows. AR 735-5, para. 13-33).

(1) *7 calendar days*—when survey and investigation are hand delivered to the respondent.

(2) *15 calendar days*—when respondent is unavailable but in the same country and the survey and investigation are mailed.

(3) *30 calendar days*—when respondent is unavailable and in a different country and the survey and investigation are mailed.

C. Respondents' Rights. AR 735-5, para. 13-40. (Approval Authority).

1. Involuntary withholding of current pay. If the approval authority approves the assessment of financial liability, the money can be involuntarily withheld from the respondent's pay.

a. Members of the armed forces may have charges involuntarily withheld. 37 U.S.C. § 1007.

b. Involuntary withholding for civilian employees. 5 U.S.C. § 5512, AR 37-1, Chapter 15.

c. No involuntary withholding for the loss of NATO property (DAJA-AL 1978/2184).

d. No involuntary withholding for the loss of MFO property.

e. Time limits for submitting rebuttal evidence are as follows. AR 735-5, para. 13-33).

2. The approval authority must notify the respondent of that collection efforts will commence in *30 days* (**NOTE: ARNG affords 60 days**). In the memorandum the approval authority must also notify the respondent of the following rights.

- a. The right to inspect and copy the file.
- b. The right to legal advice.
- c. The right to request reconsideration based on legal error.
- d. The right to a hearing before finance (for DOD civilians only).
- e. The right to request remission of indebtedness. AR 600-4
  - (1) Enlisted soldiers only.
  - (2) Only to avoid extreme hardship.
  - (3) Only unpaid portions can be remitted. Suspend collection action long enough for the soldier to submit his request for remission of the debt.
  - (4) Must request reconsideration before submitting request for remission of indebtedness.
- f. The right to request extension of collection time.
- g. The right to petition Army Board for the Correction of Military Records (ABCMR). AR 15-185
- h. Civilian employees may avail themselves of the grievance/arbitration procedures.

## **VIII. JUDGE ADVOCATE REVIEW BEFORE APPROVING AUTHORITY ACTION.**

- A. Before the approving authority approves a recommendation of liability, a judge advocate **WILL** review the survey for legal sufficiency of the evidence and propriety of the findings and recommendations. AR 735-5, para. 13-36.
- B. The approving authority is not bound by the survey officer's, or judge advocate's recommendations.

## **IX. RELIEF FROM REPORTS OF SURVEY.**

- A. Appeals. AR 735-5, paras. 13-42, 13-48 and 13-49).
  - 1. **Appeal authority** is the next higher commander above the approving authority (normally the brigade commander).
  - 2. Two step process:
    - a. Submit request for reconsideration to approval authority.
    - b. If the approving authority, after legal review and notice to respondent continues to approve financial liability, the approval authority must forward the survey to the appeal authority within **15 calendar days**.
  - 3. If the approving authority denies reconsideration the following actions are required before forwarding to the appeal authority:
    - a. Prepare a memorandum giving the basis for denying the requested relief.
    - b. The approving authority must personally sign the denial.
  - 4. The appeal authority must get an independent legal review before acting on the appeal.



5. Action by the appeal authority is final.
- B. Reopening Reports of Survey. AR 735-5, para. 13-46.
1. Not an appeal.
  2. Authority to reopen rests with the approval authority.
  3. May occur:
    - a. as part of an appeal of the assessment of financial liability.
    - b. when a response is submitted to the surveying officer from the person charged subsequent to the approving authority having assessed liability.
    - c. when a subordinate headquarters recommends reopening based upon new evidence.
    - d. when the property is recovered.
    - e. When the approving authority becomes aware that an injustice has occurred.

## **X. JUDGE ADVOCATE ROLES.**

- A. Advisor to the Survey Officer.
1. Briefing
  2. Guidance on the investigation, findings and recommendations.
- B. Legal review and advice to the Approving Authority. AR 735-5, para. 13-36.

1. Before approving authority takes action, a judge advocate must review the survey and investigation for legal sufficiency.
  2. The approving authority is not bound by the survey officer's or the judge advocate's recommendations.
- C. Legal review and advice to the Appeal Authority. AR 735-5, para. 13-49b.
1. Before appeal authority takes action on an appeal, a judge advocate must review it.
  2. Judge advocate must be different than the one who reviewed the survey and investigation for the approval authority.
- D. Attorney for Respondent. AR 27-3, para. 3-6 g(4)(b).
1. Legal Assistance office required assist on rebuttal to report of survey.
  2. Civilians not otherwise entitled to legal assistance receive assistance for report of survey purposes.

## **XI. CONCLUSION.**



**CHAPTER L**  
**LINE OF DUTY INVESTIGATIONS AND**  
**DETERMINATIONS**

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# **LINE OF DUTY INVESTIGATIONS AND DETERMINATIONS**

## ***OUTLINE OF INSTRUCTION***

### **I. REFERENCES.**

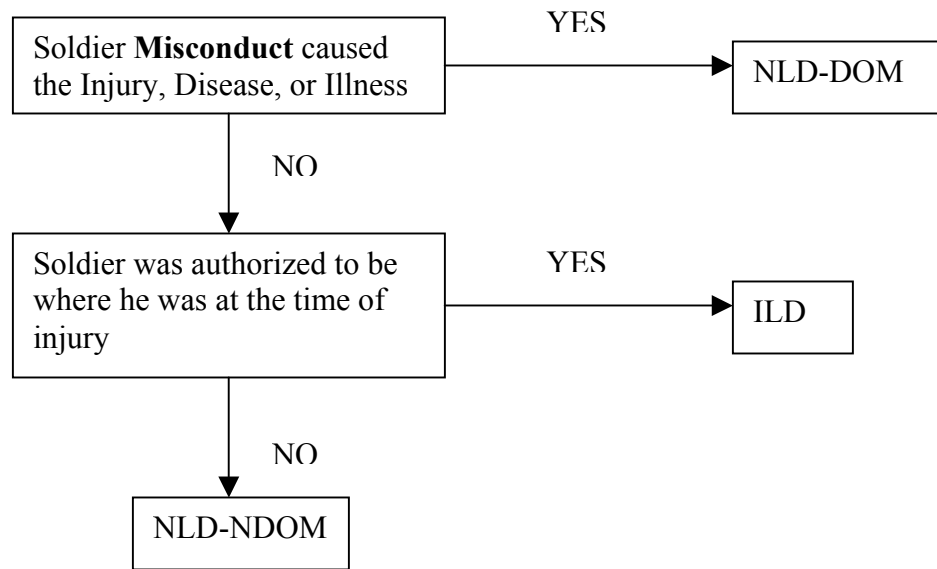
- A. 10 USC §§ 972, 1201-1207 and 1219.
- B. 38 USC §§ 101 and 105.
- C. AR 600-8-1, Army Casualty and Memorial Affairs, Chapters 37-41 (18 Sept. 1986).

### **II. INTRODUCTION/PURPOSE.**

### **III. LINE OF DUTY DETERMINATIONS.**

- A. Two-step analysis:
  - 1. Did the service member's misconduct cause the injury, illness, or disease?
  - 2. What was the service member's status?
- B. Three possible outcomes:
  - 1. Not in Line of Duty-Due to Own Misconduct (NLD-DOM).
  - 2. In Line of Duty (ILD).
  - 3. Not in Line of Duty-Not Due to Own Misconduct (NLD-NDOM).

C. Chart:



D. Examples:

1. **In Line of Duty**. Soldier is injured in car crash. Crash is caused by another driver's negligence. Soldier is considered to be in the line of duty.
2. **Not in Line of Duty Not Due to Own Misconduct**: Soldier is AWOL, but otherwise doing nothing wrong. While walking down the street, soldier is hit by a car that jumps the curve and seriously injured. Soldier is considered to be not in the line of duty, but due to own misconduct.
3. **Not in Line of Duty Due to Own Misconduct**: Soldier gets drunk at a party and attempts to drive home but is involved in an accident on the way. Soldier is considered to be not in the line of duty due to own misconduct.

#### IV. IMPACT OF DETERMINATIONS.

A. **In Line of Duty (ILD)**. Soldier may be entitled to:

1. Army Disability Retirement or Separation Compensation.

2. VA Compensation and Hospitalization Benefits.

3. Incapacitation Pay (ARNG/USAR).

B. Not in Line of Duty - Not Due to Own Misconduct (NLD-NDOM) and Due to Own Misconduct (NLD-DOM):

1. If on active duty, soldier is denied disability retirement or separation compensation.

2. If disabled after leaving AD, soldier may be denied VA disability or hospitalization benefits.

3. May be denied civil service preference.

4. ARNG/USAR soldiers may be denied incapacitation pay.

C. Not in Line of Duty-Due to Own Misconduct (NLD-DOM):

1. Days lost > 1 added to service obligation.

2. Days lost > 1 may be excluded from computations for pay and allowances.

3. May result in loss of pay where disease (not injury) immediately follows intemperate use of drugs (includes alcohol).

**V. PROCEDURES.**

A. Informal Investigation **by the Unit Commander** when:

1. No misconduct is suspected.

2. No negligence is suspected.

3. Formal investigation is not required.
  4. **KEY:** Informal investigation can **only** result in an ILD determination.
- B. Appointing Authority must conduct a formal Investigation through an Investigating Officer (IO) [IAW AR 15-6] when:
1. Unusual or doubtful circumstances exist.
  2. Injury or death involving alcohol or drug abuse.
  3. Self-inflicted injuries or suicide.
  4. Injury or death incurred while AWOL.
  5. Training death of a USAR/ARNG soldier.
  6. Injury or death of a USAR or ARNG member while traveling to or from authorized training or duty.
  7. Injury or death occurring while en route to final acceptance in the Army.
  8. When USAR/ARNG soldier serving active duty tour of 30 days or less is disabled by disease.
  9. In connection with an appeal of an unfavorable finding of alcohol or drug abuse.
  10. Death cases: Do investigation but make no LOD determination  
Veteran's Administration will make LD determination.
- C. Evidentiary standards and presumptions:



1. Soldier is presumed ILD **UNLESS** refuted by substantial evidence contained in the investigation.
2. A finding or determination must be supported by a greater weight of evidence than supports any different conclusion.
3. A reasonable person must be convinced of the truth or falseness of a fact considering equally direct and indirect evidence.
4. **KEY:** Must use the rules in Appendix F.

D. Other Services.

1. When a member of another service is injured, dies, or incurs a disease under circumstances warranting a Line of Duty investigation, the MTF Commander will notify the nearest command of the parent service.
2. If the parent service requests an investigation, the Army will conduct one and forward it to the parent command.

**VI. DUE PROCESS.**

A. During Evidence Collection

1. Soldier not required to make a statement against interest.
2. Soldier must be advised that he or she does not have to make a statement against interest.
3. If soldier is not informed of right not to make statement, or is forced to make statement, it cannot be used in making the LOD determination (10 USC § 1219).

B. Regarding Adverse Findings

1. IO must provide soldier with written notice of proposed adverse finding, a copy of the investigation, and the supporting evidence.
2. IO must issue warning regarding making statements against interest
3. IO must give a reasonable opportunity to reply in writing and to offer rebuttal.
4. If IO receives a response, it must be considered before findings are finalized. If IO does not receive a response, the IO may proceed to finalize the findings

C. Final Approval Authority Decision

1. Final approval authority either approves or disapproves the finding under the authority of the Secretary of the Army.
2. The report must be forwarded to the service member through his command.
3. The transmittal letter must notify the service member of his right not to make a statement against interest and of his appellate rights.

D. Appellate Rights

1. The service member may appeal in writing within 30 days after receipt of the notice of adverse finding.
2. The service member's appeal is to the final approval authority.
3. The final approval authority may only change the finding to "in line of duty," based on substantial new evidence.

## **VII. JUDGE ADVOCATE CONSIDERATIONS.**

- A. Advising the IO.
- B. Understanding the Burdens.
  - 1. “Greater weight than supports any different conclusion”.
  - 2. Balancing the ILD presumption with specific rules.
- C. Legal Review on Behalf of the Command.
  - 1. Have requirements been complied with?
  - 2. Is there error?
  - 3. Are findings supported by substantial evidence?
  - 4. Are potential claims involved?
- D. The Legal Assistance Perspective.

## **VIII. CONCLUSION.**

# CHAPTER M

## DEFENSIVE FEDERAL LITIGATION

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## **Outline of Instruction**

### **I. REFERENCES.**

- A. Army Regulation 27-40, Litigation (19 September 1994). This regulation is currently under revision.
- B. 28 U.S.C. §§ 501-519 (2001) (defining Department of Justice responsibilities).
- C. 28 C.F.R. § 15.3 & § 50.15 (DOJ rules related to individual representation).
- D. Claims Judge Advocate Litigation Handbook, Tort Branch, Army Litigation Division (5<sup>th</sup> Ed. 2000).
- E. Federal Civil Judicial Procedure and Rules (West 2001).

### **II. INTRODUCTION.**

- A. Military decisions, programs, and policies are subject to judicial review by the federal courts.
- B. The unique character of the military influences the scope of review.

“We know that from top to bottom of the Army the complaint is often made . . . that there is objectionable handling of men. But judges are not given the task of running the Army. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be not to intervene in judicial matters.” Orloff v. Willoughby, 345 U.S. 83, 93 (1953)

- C. Judicial deference today.

### **III. THE DEPARTMENT OF JUSTICE**

- A. Representation of the interests of the United States. 28 U.S.C. §§ 516 - 519.
- B. Relationship with Department of the Army.

### **IV. ARMY LITIGATION OPERATIONS**

- A. The Army Litigation Division.
- B. The Army Contract Appeals Division.
- C. The Army Environmental Law Division.
- D. The Army Procurement Fraud Division.
- E. The Army Intellectual Property Law & Regulatory Law Division.
- F. SJA Offices
  - 1. Service of Process. AR 27-40, Chapter 2.
  - 2. Subpoenas. AR 27-40, para. 7-7.
  - 3. Witness Requests. AR 27-40, para. 7-8.
  - 4. Jury Duty. AR 27-40, para. 10-1.
  - 5. Reporting Requirements. AR 27-40, para. 3-8.
  - 6. Litigation Reports. AR 27-40, para. 3-9, See Section VIII below.

### **V. TYPES OF SUITS FILED AGAINST THE ARMY AND ARMY OFFICIALS.**

- A. Subject-matter of Litigation (illustrative, not exclusive):
  - 1. Enlistments, inductions, activations.
  - 2. Discharges.
  - 3. Transfers and assignments.
  - 4. Promotions.
  - 5. Personnel policies.
  - 6. Military programs.

7. Civilian personnel actions.
8. Installations management decisions.
9. Environmental compliance and remediation.
10. Bankruptcy (as a creditor).
11. Personal injury, death, or property damage caused by the negligence of Federal employees.
12. Civil challenges to courts-martial convictions (habeas actions, corrections of military records).
13. Contract disputes.
14. Freedom of Information and Privacy Act.
15. Federal and state administrative regulatory activities.

B. Types of Relief Sought.

1. Damages (money).
2. Injunction/mandamus.
3. Declaratory judgment.
4. Habeas corpus.

## **VI. SYSTEMATIC ANALYSIS OF LEGAL ISSUES IN SUITS AGAINST THE ARMY.**

A. The arguments.

1. Sovereign immunity.
2. Federal jurisdiction.
3. Justiciability (remedy).
4. Exhaustion of administrative remedies.

5. Immunities or Judicial bars.
6. Reviewability or scope of review.
7. Trial on the merits.

## **VII. SUITS AGAINST OFFICERS IN THEIR INDIVIDUAL CAPACITY.**

### **A. Where is the Suit Defended?**

1. Federal court.
2. State court.

### **B. Who Will Provide Representation.**

1. Role of the Department of Justice (DOJ).
2. Role of the installation Staff Judge Advocate.
  - a) Request the local U.S. Attorney provide temporary representation when “time for response is limited.” Army Reg. 27-40, Legal Services: Litigation, para. 3-2a(2).
  - b) Referring the request for representation to Litigation Division, OTJAG. AR 27-40, para. 3-2a(3).

### **C. DOJ Representation Criteria 28 C.F.R. § 15.3 & § 50.15.**

1. Current or former employee of the federal government.
2. Acting within the course and scope of employment.
3. Not in connection with a federal criminal proceeding or agency disciplinary matter.
4. Best interests of the United States.
5. Who Is Liable for an Adverse Judgment?
  - a) Judgments against individual federal employees and the United States are paid by the United States.
  - b) Judgments against individual federal employees are the responsibility of the employee.



D. Immunities.

1. Statutory immunity and judicial bar for **common law torts**.

- a) Federal Employees Liability Reform and Tort Compensation Act, (codified at and amending 28 U.S.C. §§ 2671, 2674, 2679) (The Westfall Act). Federal employees, including members of the Armed Forces, who are sued for state law torts committed within the scope of their employment. *United States v. Smith*, 499 U.S. 160 (1991); *Schneider v. United States*, 27 F.3d 1327 (8<sup>th</sup> Cir. 1994).
  - (1) Certification.
  - (2) Motion to substitute.
  - (3) Reviewability. *Gutierrez de Martinez, et al v. Lamango*, 115 S.Ct. 2227 (1995).
- b) Military medical or dental personnel performing medical, dental, or other health-related functions within the scope of their employment. 10 U.S.C. § 1089 (The Gonzalez Act).
- c) Lawyers or members of legal staffs rendering legal advice within the scope of their employment. 10 U.S.C. § 1054.
- d) Judicial bar applicable in suits filed by another servicemember when claim arises “incident to service.” *Feres v. United States*, 340 U.S. 135 (1950).

2. Judicially created immunity for **constitutional torts**.

- a) General rule: You get only a “qualified immunity” from suit. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).
  - Test for qualified immunity: Did the individual defendant’s actions violate a clearly established constitutional right of which a reasonable person would have known?
- b) Exceptions: You are absolutely immune when:
  - (1) Your actions were quasi-judicial or quasi-prosecutorial in character. *Butz v. Economou*, 438 U.S. 486 (1978).

- (2) The suit is filed by another servicemember alleging a constitutional claim arising “incident to service.” *Chappell v. Wallace*, 462 U.S. 486 (1983).
- (3) The suit is filed by a Federal civilian employee on a claim that is covered by the Civil Service System. *Bush v. Lucas*, 462 U.S. 367 (1983).

## VIII. LITIGATION REPORTS

### A. References.

- 1. Army Regulation 27-40, Litigation (19 SEP 94), Chap. 3.
- 2. Claims Judge Advocate Litigation Handbook, Tort Branch, Army Litigation Division (5<sup>th</sup> Ed. 2000).
- 3. Federal Civil Judicial Procedure and Rules (West 2001).

### B. Elements of a litigation report.

- 1. **Statement of Facts.** This is the most important part of a Litigation Report. The type of suit (e.g. FTCA, Labor, FOIA) will dictate the facts that should be emphasized. But in every case, a complete, accurate and documented set of facts should be the first priority.
  - a) Documentation. All factual statements should be followed by a reference to a specific Exhibit or Tab, and page number (or line number if helpful) in the Lit. Report. All witness statements or supporting documents must be attached as an Exhibit or Tab. *Example: Plaintiff's claim is for the loss of consortium of her husband. (Exhibit 4, pg. 2).*
  - b) Personal History. Include a detailed personal history of the Plaintiff. The history may include, but is not limited to: military service, employment, military/civilian education, family, earning/tax history, medical history.
  - c) Factual History. A detailed description of the facts that relate to the plaintiff's cause of action. All referenced with specific supporting exhibits.
  - d) Procedural History. A detailed description of the progression of pre-litigation actions, including pre-litigation claims or administrative actions, pre-litigation negotiations or settlement offers. Also helpful to include dates for responsive pleading, discovery or motions.

- e) Chronology. A succinct time line of the events leading to suit. The Chronology can be included as an Exhibit. *Example:*

10 JAN 98 - Plaintiff Smith filed Informal EEO Complaint (Exhibit G)  
16 JUL 98 - Plaintiff Smith filed Formal Complaint (Exhibit K)  
14 DEC 00 - Suit filed in Western Dist. of Kentucky (Exhibit J)  
30 DEC 00 - Complaint Served on U.S. Attorney (Exhibit L)

- f) Use plain language. Avoid or explain military, medical or other jargon.

**2. Set-off or Counterclaim.** Identify all potential setoffs or counterclaims and the supporting facts and/or law.

**3. Responses to Pleadings.**

- a) Draft Answer to the Complaint. Each allegation should be specifically addressed. Answers may be qualified.
- b) Affirmative Defenses. Identify potential affirmative defenses. Remember some defenses may be waived if not raised in the initial response.

**4. Memorandum of Law.**

- a) Brief Statement of Legal Issues and Potential Defenses.
- b) Military Unique Issues. (e.g. *Feres* Doctrine, Exhaustion of Administrative Remedies)
- c) Jurisdiction Unique Issues. (e.g. State Tort Damages Caps, seat belt statutes, scope of employment definitions)
- d) Analysis. Apply the facts to the law and make recommendations as to course of conduct.
- e) Format Unimportant. (Lawyer to lawyer memo, not being submitted for law review publication.)
- f) Coordinate with military litigation attorney. Often military litigating attorney will already understand law and save you time researching this area.

**5. Potential Witness Information.** The second most important part of the Litigation Report. The witness list should include:

- a) Full Name

- b) Rank/Status
- c) SSN
- d) Work Addresses and telephone number.
- e) Home address and telephone number.
- f) E-mail addresses.
- g) PCS/ETS or Departure from employment date.
- h) Forwarding addresses.
- i) Brief summary of the witnesses' testimony (FRCP 26(a)).
- j) Expert Witnesses. Include Bio or Curriculum Vitae (CV) as an exhibit to the Lit. Report.
- k) Witness List Example:

**John Joe Doe**, M.D., Major, US Army, Medical Corps, Gen. Surgery,  
 SSN: 123-45-6780, PCS – July 01.  
 Work Address: Womack Army Medical Center (WAMC), Fort Bragg, North  
 Carolina 28310;  
 Work phone (910) 123-1234;  
 Home address: 1234 Army Drive, Fayetteville, NC 28311;  
 Home phone: (910) 123-6789;  
 E-mail Address: john.doe@WAMC.army.mil;  
 Testimony: Dr. Doe is expected to testify concerning the treatment provided to  
 Dead Husband on October 1997.

**6. Exhibits.** Attach all relevant documents as exhibits.

- a) Index of Exhibits.
- b) Witness Interview Summaries.
- c) Relevant Documents (paginated)
- d) Photographs.
- e) Chronologies.
- f) Draft Discovery. (Interrogatories, Requests for Admissions)
- g) Draft Motions.

- h) Prior Correspondence with Plaintiff.
- i) Pre-litigation reports of investigations or administrative proceedings. (e.g. MSPB or EEOC Briefs).
- j) Potential Expert Witnesses.

**7. Distribution.**

- a) AR 27-40 Requirements:
  - (1) Original and 1 copy to responsible HQDA litigating division.
  - (2) One copy to U.S. Attorney's Office.
  - (3) Electronic Courtesy Copy to Litigation Division.
- b) Common Sense.
  - (1) Coordinate with HQDA litigating division prior to sending.
  - (2) Keep office copy until suit is resolved.

**C. General guidance.**

- 1. Assume all actions will require a Litigation Report to be prepared. The suspense for a Lit. Report can often be short. Organize and document accordingly.
- 2. Coordinate with the military litigation attorney as soon as a litigation report is requested.
- 3. Coordination with the Assistant U.S. Attorney should be in conjunction with proper litigation attorney. While DOJ may not need/want a Lit. Report, the Army requires it.
- 4. The 80% solution on time is better than the 100% solution late.
- 5. Focus on collecting, documenting, and preserving the facts. Remain objective.

**IX. CONCLUSION.**

# **Litigation Report Checklist**

References: AR 27-40, Para. 3-9; Individual litigation attorneys

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## **1. Statement of Facts**

- \_\_\_\_\_ Complete Statement of Facts.
  - All facts pertaining to claims raised in the judicial complaint.
  - All facts pertaining to potential defenses to claims in judicial complaint.
  - Dates for all complaints and responsive actions.
  
- \_\_\_\_\_ All Facts Supported by Documents/Statements.
  - All supporting documents and statements are attached and tabbed.
  - Statement of facts references all supporting tabbed evidence.

## **2. Setoff or Counterclaim**

- \_\_\_\_\_ Discuss any prior settlements or settlement offers.
  
- \_\_\_\_\_ Discuss any possible counterclaim, i.e. fraud.

## **3. Responses to Pleadings**

- \_\_\_\_\_ Prepare a Draft Answer to the Judicial Complaint.
  - Respond to each and every fact asserted.
  - Deny what is false.
  - Admit what is true.
  - If neither, deny as presented and aver or explain our position.
    - < Explains tangential facts not contained in litigation report.
    - < Factual supplement to the litigation report.

## **4. Memorandum of Law**

- \_\_\_\_\_ Prepare Brief Statement of the Legal Issues and Potential Defenses.
  - Format not important.
  - View it as a lawyer to lawyer memo highlighting the legal issues.
  - Do not worry about legal citations.
  - Do not let this requirement delay the litigation report.

## **5. Potential Witness Information**

- \_\_\_\_ Complete List of Potential Witnesses
- Collect SSN if possible.
  - Work address and phone number.
  - Home address and phone number if available.
  - E-Mail Address.
  - PCS/ETS Date.
  - Forwarding Address.
  - Brief statement of witness relevance and to what they can attest.

## **6. Exhibits**

\_\_\_\_ Copy of all relevant documents attached and tabbed.

\_\_\_\_ Index/List of tabs and exhibits included.

## **7. Distribution**

\_\_\_\_ One Copy to the Litigation Attorney at Litigation Division.

\_\_\_\_ One Copy to the Assistant U.S. Attorney Assigned to the Case.

\_\_\_\_ Computer Disk of Litigation Report included in Copy to Litigation Division.

\_\_\_\_ Retain Copy.

# ADMINISTRATIVE AND CIVIL LAW DEPARTMENT

## ***BASIC COURSE DESKBOOK***



### **Part II**

### **Military Personnel Law**

The Judge Advocate General's School  
United States Army

March 2002

JA 280



**CHAPTER N**  
**MILITARY PERSONNEL LAW**  
**ARMY PERSONNEL SYSTEM**  
**AND**  
**OFFICER PERSONNEL LAW**

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## **Outline of Instruction**

### **I. REFERENCES.**

- A. Title 10, United States Code.
- B. National Defense Authorization Act, Fiscal Year 1995, Pub. L. No. 103-337.
- C. National Defense Authorization Act, Fiscal Year 1996, Pub. L. No. 104-106.
- D. National Defense Authorization Act, Fiscal Year 1997, Pub. L. No. 104-194.
- E. National Defense Authorization Act, Fiscal Year 1998, Pub. L. No. 105-85.
- F. DOD Instruction 1332.29, Eligibility of Regular and Reserve Personnel for Separation Pay.
- G. DOD Directive 1332.30, Separation of Regular and Reserve Commissioned Officers.
- H. DOD Instruction 1332.40, Separation Procedures for Regular and Reserve Commissioned Officers.
- I. AR 15-80, Army Grade Determination Review Board.
- J. AR 600-8-24, Officer Transfers and Discharges.
- K. AR 600-8-29, Officer Promotions.

### **II. INTRODUCTION.**

- A. The Department of Defense (DOD) (10 U.S.C. § 111).

1. An executive department of the United States which includes the Joint Chiefs of Staff, the Defense Agencies, the Military Departments (Army, Navy, Air Force), and the unified and specified combatant commands.
2. The Secretary of Defense has authority, direction, and control over the Department of Defense and is the principal assistant to the President in all matters relating to the Department.

B. The Joint Chiefs of Staff (JCS) (10 U.S.C. §§ 151-155).

1. Consists of the Chairman, Vice Chairman, the Chiefs of Staff of the Army and Air Force, the Chief of Naval Operations, and the Commandant of the Marine Corps.
2. The Chairman of the Joint Chiefs of Staff is the principal military advisor to the President, the National Security Council, and the Secretary of Defense.
  - a. The Chairman of the Joint Chiefs of Staff is responsible for a variety of functions including strategic direction, strategic planning, contingency planning and preparedness, advice on requirements, programs and budget, and doctrine, training, and education.
  - b. In carrying out his functions, duties, and responsibilities, the Chairman shall consult with and seek the advice of the other members of the Joint Chiefs of Staff and the commanders of the unified and specified commands.

C. The Combatant Commands (10 U.S.C. §§ 161-168).

1. Established by the President, through the Secretary of Defense, to perform military missions.
2. May be unified or specified.

- a. Unified combatant commands are military commands that have broad, continuing missions and are composed of forces from two or more military departments (e.g. CENTCOM, EUCOM, PACOM).
- b. Specified combatant commands are military commands that also have broad, continuing missions but are normally composed of forces from a single military department.

3. Chain of Command.

- a. Unless otherwise directed by the President, the chain of command to a unified or specified combatant command runs from the President to the Secretary of Defense and from the Secretary of Defense to the commander of the combatant command.
- b. The commander of a combatant command performs his duties under the authority, direction, and control of the Secretary of Defense and is directly responsible to the Secretary for the preparedness of the command to carry out missions assigned to the command.
- c. The Chairman of the Joint Chiefs of Staff does not have **command** authority over the combatant commands. He serves as a channel of communication between the National Command Authority (i.e., the President and Secretary of Defense) and the combatant commanders. He also acts as a spokesman for the commanders of the combatant commands, especially on the operational requirements of their commands.

D. The Department of the Army (DA) (10 U.S.C. §§ 3001-3081).

- 1. The Department of the Army is separately organized under the Secretary of the Army. It operates under the authority, direction, and control of the Secretary of Defense.
- 2. The Army includes combat and service forces, and organic aviation and water transports. It is organized, trained, and equipped primarily for prompt and sustained combat incident to operations on land.

E. The Other Services.

1. The Department of the Navy (10 U.S.C. §§ 5001-5150).

a. Includes Headquarters, Marine Corps.

b. May also include the Coast Guard in certain situations.

2. The Department of the Air Force (10 U.S.C. §§ 8011-8081).

### **III. COMPOSITION OF THE ARMY.**

A. “The Army consists of: the Regular Army, the Army National Guard of the United States, the Army National Guard while in the service of the United States, the Army Reserve, and all persons appointed or enlisted in, or conscripted into, the Army without component.” (10 U.S.C. § 3062).

B. Regular Army (RA) (10 U.S.C. § 3075). All soldiers who serve continuously on active duty and all RA retirees.

C. The Reserve Components (10 U.S.C. § 10101).

1. Army National Guard of the United States (10 U.S.C. § 10105). The Army National Guard of the United States consists of federally recognized units and organizations of the Army National Guard.

2. Army National Guard in the Service of the United States (10 U.S.C. § 10106).

3. Army Reserve (10 U.S.C. § 10104). All members of the Reserve of the Army who are not members of the Army National Guard of the United States.

D. Elements of the Army Reserve (10 U.S.C. § 10141). See Appendix.

1. Ready Reserve (10 U.S.C. §§ 10142-10150).

2. Standby Reserve (10 U.S.C. §§ 10151-10153).

3. Retired Reserve (10 U.S.C. § 10154).

E. Missions.

1. Regular Army.

2. Army Reserve.

3. Army National Guard.

#### **IV. OFFICER STATUS.**

A. Appointment.

1. Proper authority makes appointment.

a. For Other Than Regular Army (OTRA) officers below the rank of lieutenant colonel (LTC): President.

b. For OTRA officers in the rank of LTC and above and for RA Officers: President/Senate.

c. For Warrant Officers: Secretary of the Army for warrant officers (WO1); President for chief warrant officers (CW2-CW5).

2. Tender of appointment to individual.

3. Acceptance by individual. There is a statutory presumption of acceptance unless the appointment is expressly declined.

B. Commissioned Officer v. Warrant Officer.

## V. KEY CONCEPTS.

- A. Status of the officer determines the amount of due process available to the officer in separation actions.
- B. Regular Army (RA) v. Other Than Regular Army (OTRA).
  - 1. Regular Army Officer: An officer who holds a grade and office under a commission signed by the President, and who is appointed as an officer in the **standing Army**.
  - 2. Other Than Regular Army Officer: An officer who holds a grade and office under a commission signed by the President, and who is appointed as an officer in a **Reserve Component of the Army**.
  - 3. After 30 September 1996, no person may receive an original appointment as a commissioned officer in the Regular Army (Navy, Air Force, or Marine Corps) until that person has completed one year of service on active duty as a commissioned officer of a reserve component. 10 U.S.C. § 532 (e).
- C. Probationary v. Nonprobationary.
  - 1. Probationary Officer.
    - a. A commissioned officer (RA or OTRA) with less than 5 years of active commissioned or commissioned service.
    - b. As of 1 October 1996, **all** newly commissioned officers are probationary for 5 years.
  - 2. Nonprobationary Officer. An officer other than a probationary commissioned officer. Receives significant due process in transfer and discharge actions.

## **VI. THE ACTIVE DUTY PROMOTION SYSTEM FOR ARMY OFFICERS.**

### **A. Active Duty List (ADL).**

1. All officers on active duty regardless of component.
2. Centralized, with minor exceptions.
3. Competitive category.
4. Special Branches - Medical Professionals, Chaplains, and Judge Advocates.

### **B. Zones of Consideration.**

1. Promotion Zone.
2. Below the Zone (BZ).
3. Above the Zone (AZ).

### **C. Basic Promotion Policies.**

1. When an officer on active duty is promoted, that officer is promoted in his or her component.
2. Minimum time in grade requirements for promotion.

The Defense Officer Personnel Management Act (DOPMA) establishes minimum time in grade (TIG) requirements (18 months to 1LT; 2 years to captain (CPT); 3 years to major (MAJ) through LTC; 1 year to colonel (COL) and brigadier general (BG)).

3. Selection criteria.



- a. “Up or Out” system retained.
  - b. Failure to be selected for promotion to LTC, MAJ, CPT, CW5, CW4, and CW3.
    - (1) Officers on the active duty list (ADL) who are twice nonselected for promotion will be separated not later than the first day of the seventh calendar month beginning after the month in which the Secretary of the Army approves the report of the board which considered them for the second time.
    - (2) Alternatives include resignation, selective continuation, and retirement.
  - c. ADL officers not recommended for promotion to CW2 or 1LT will be separated NLT 90 days after the Promotion Review Authority approves their nonrecommendation.
- D. Other Than Regular Army (OTRA) Judge Advocate Officer Career Status Procedures. See JAGC Personnel Policies, reprinted in the JAGC Personnel and Activity Directory.
- 1. **STEP 1.** Obligated Volunteer (OBV) - OTRA officers may apply for Conditional Voluntary Indefinite (CVI) status after completion of two years on active duty as a judge advocate (JA) officer. Officers not selected for CVI status will be released from active duty (REFRAD) at the end of their service obligation.
  - 2. **STEP 2.** CVI status officers will be considered for Voluntary Indefinite (VI) status upon the completion of five years on active duty as a JA. Officers not selected will be REFRAD 180 days following nonselection or at the end of their service obligation, whichever is later.
  - 3. **STEP 3.** VI officers will be integrated into the Regular Army (RA) upon promotion to major.

## **VII. SEPARATION PAY FOR INVOLUNTARY SEPARATIONS (DOD INSTRUCTION 1332.29, PARA C).**

### **A. Basic eligibility requirements.**

1. Six years active duty.
2. Honorable service.
3. Involuntary separation.
4. Written agreement to serve in Ready Reserve for at least 3 years.

### **B. Full Separation Pay.**

1. Officers who are involuntarily separated for the following reasons may receive full separation pay.
  - a. Fully qualified but denied continuation on AD.
  - b. Fully qualified but being separated under reduction in force (RIF).
2. Computation.
  - a. \$30,000 ceiling eliminated.
  - b. Formula: 10% of annual base pay times the number of years service.
  - c. Example. CPT with 8 years service.

$$(.10 \times (12 \times \$4,070.10 \text{ (monthly base pay)})) \times 8 \text{ (years in service)} \\ = \$39,072.96$$

- C. Half Separation Pay. Officers who are involuntarily separated for cause **may** receive half separation pay.
  - 1. Homosexuality.
  - 2. Drug or alcohol abuse rehabilitation failure.
  - 3. For the convenience of the government.
  - 4. Security.
- D. Officers involuntarily separated due to substandard performance or misconduct do not receive separation pay.

## **VIII. SPECIAL SEPARATION BENEFIT (SSB) (10 U.S.C. § 1174A) AND VOLUNTARY SEPARATION INCENTIVE (VSI) (10 U.S.C. § 1175).**

- A. Eligibility for SSB and VSI.
  - 1. Between 6 and 20 years of service.
  - 2. Five years of continuous Active Duty or full time Guard duty immediately preceding the date of separation.
  - 3. Not eligible for retired pay.
  - 4. RA or reserve officer on ADL.
  - 5. Agreement to serve in the Reserves.
  - 6. ***Other requirements established by the Secretary.***
- B. Special Separation Benefit (SSB) 10 U.S.C. § 1174a.
  - 1. One time lump sum.

2. Formula: 15% of annual base pay times the number of years service.

3. Example: CPT with 8 years service.

$$(.15 \times (12 \times \$4,070.10 \text{ (last month base pay)})) \times 8 \text{ (years in service)} = \$58,609.44.$$

C. Voluntary Separation Incentive (VSI) 10 U.S.C. § 1175.

1. Annual payments for twice the number of years of active duty.

2. Formula: 2.5% of annual base pay times the number of years service paid annually for twice the number of years in service.

3. Example: CPT with 8 years in service.

$$(.025 \times (12 \times \$4,070.10 \text{ (last month's base pay)})) \times 8 \text{ (years in service)} = \$9,768.24 \times 16 \text{ (twice the number of years service)} = \$156,291.84 \text{ paid at a rate of } \$9,768.24 \text{ annually for 16 years.}$$

D. Limitations on SSB/VSI.

1. Acceptance of DOD civilian position within 180 days results in loss of SSB/VSI.

2. Disability/retired pay set-off. 10 U.S.C. § 1174 (h).

3. Subject to the availability of appropriations.

4. Temporary drawdown program available until 31 December 2002.

**IX. SELECTIVE CONTINUATION ON ACTIVE DUTY (10 U.S.C. § 637).**

A. Applies to RA and OTRA officers.

The Secretary of the Army may (based on the needs of the service for specific skills) convene selective continuation boards to retain twice nonselected officers on active duty (CPTs until 20 years time in service (TIS); MAJs until 24 years TIS)(unless promoted).

B. Section 638a Modification to Selective Continuation Rules.

1. Effective 1 October 1990 to 31 December 2001.
2. Secretary of the Army may shorten continuation periods.

C. Status of Selective Continuation.

**X. SELECTIVE EARLY RETIREMENT (SERB) (AR 600-8-24, CHAP 6, PARA 6-30).**

A. 10 U.S.C. § 638 provides authority for the Secretary of the Army to convene boards to select officers for retirement before their mandatory retirement date.

B. 10 U.S.C. § 638a modifies the rules during drawdown.

1. COL with 4 years TIG (2 years during drawdown).
2. LTC twice nonselected for promotion to COL (once during drawdown).
3. Drawdown officers below COL who are not promotable and retirement eligible or within 2 years of eligibility.
4. Board may select no more than 30% of officers.

**XI. VOLUNTARY EARLY RETIREMENT (106 STAT 2315).**

A. Temporary drawdown program available until 31 December 2002.

B. Authorizes retired pay for selected soldiers with between 15-20 years of service.

1. Secretary of the Army determines who is eligible.
2. Retired pay reduced 1% for each year less than 20.
3. SSB/VSI recipients may convert to early retirement program. Retirement pay set-off by amounts received under SSB/VSI.

## **XII. RETIRED GRADE (10 U.S.C. § 1370).**

- A. Minimum Time in Grade Requirements (Voluntary Retirements).
  1. Six months for MAJ and below.
  2. Three years for LTC through major general (MG). The President may waive this requirement in individual cases involving extreme hardship or exceptional or unusual circumstances.
  3. Secretary of the Army may reduce TIG requirement to 2 years for LTC and COL. (Drawdown tool that expires 31 December 2001, unless extended.)
- B. Secretary of the Army makes satisfactory grade determination.

## **XIII. RETIRED PAY (10 U.S.C. § 1401-1412).**

- A. Member before 8 September 1980: Multiplier times years in service times high month's pay.
- B. Member on or after 8 September 1980: Multiplier times years in service times high three year average of base pay.
- C. Retired pay multiplier (10 U.S.C. § 1409).
  1. Member before 1 August 1986: Multiplier equals 2.5 percent per year. For a twenty year retirement, officer will receive 50%.

2. Member on or after 1 August 1986: Multiplier equals 2.5 percent per year minus 1 percent for each year of service less than 30. For a twenty year retirement, officer will receive 40%. **NOTE:** As a result of the FY 2000 Defense Authorization Act, members who entered the service after July 31, 1986, will be given a choice of retirement plans at their 15th year of service. There are two options:
  - a. Take the pre-1986 retirement system (High-Three Year Average System) or
  - b. Elect the post-1986 retirement system (Military Retirement Reform Act (MRRA) of 1986, commonly referred to as REDUX) and take a \$30,000 career retention bonus.
3. Retired pay readjusted to the higher level at age 62.

#### **XIV. RECOUPMENT (10 U.S.C. § 2005).**

- A. Policy. Individuals who participate in certain advanced education programs and fail to complete their educational requirements or military service obligations are subject to recoupment.
- B. Procedures.
  1. Defense Finance and Accounting Service (DFAS) procedure initiated by the officer's local commander.
  2. Recoupment must be accomplished prior to separation.

#### **XV. OFFICER TRANSFERS AND DISCHARGES.**

- A. Controlling Regulation.
  1. AR 600-8-24. Effective 1 November 1995.
  2. Replaced AR 635-100 and AR 635-120. Actions initiated under the old regulations are to be completed under the old regulations, however.

B. AR 600-8-24 breaks officer transfers and discharges into six areas:

1. Voluntary Release From Active Duty (REFRAD) - Chapter 2, paras 2-5 through 2-20.
2. Involuntary REFRAD - Chapter 2, Paragraphs 2-21 through 2-42.
3. Resignations - Chapter 3.
4. Eliminations - Chapter 4.
5. Miscellaneous Types of Separations - Chapter 5.
6. Retirements - Chapter 6.

C. Purposes of Officer Transfers and Discharges.

1. Provide a way to terminate service prior to the terms of the original contract.
2. Provide authority to transfer officers from one component to another.
3. Provide authority to discharge officers from all military obligations.
4. Support the Army's personnel life-cycle function of transition.

D. Other Considerations.

1. Counseling.
  - a. Required for commissioned officers with less than 10 years active federal commissioned service.
  - b. Triggered when such officers submit a request for voluntary REFRAD or an unqualified resignation.



- c. Counseling is by the first colonel in the officer's chain of command or supervision. Chaplains, judge advocates, and medical officers will be counseled by a senior officer of their branch in the chain of technical supervision or as specifically designated by their branch.
- d. Counseling must include the following:
  - (1) Advice concerning the opportunities available in the military.
  - (2) A discussion of the officer's previously achieved investment in the Army.
  - (3) A determination as to whether the officer has satisfied all applicable service obligations.
  - (4) A determination that the officer is not under investigation or charges, awaiting the results of trial, or being considered for administrative elimination.
  - (5) A determination that the officer is not AWOL, in the confinement of civil authorities, suffering from a severe mental disease or defect, or in default in respect to public property or public funds.
  - (6) Advice encouraging a RA officer to accept an appointment in the U.S. Army Reserve. RC officers will be encouraged to retain their commissioned status in the U.S. Army Reserve.
  - (7) The addresses of agencies that can provide the officer with information about U.S. Army Reserve career opportunities. See Table 1-1.

2. Involuntary Separation of Officers with Access to Sensitive Programs.  
AR 600-8-24, para 1-18.

- a. Coordination with supporting security officials required. Separation will not occur unless the security official concurs with the action.
- b. Applies to officers in the following categories:

- (1) Knowledge of sensitive compartmented information (SCI).
- (2) Nuclear Weapon Personnel Reliability Program assignment.
- (3) Knowledge of Single Integrated Operational Plan—Extremely Sensitive Information (SIOP-ESI).
- (4) Special Access Program (SAP) knowledge.
- (5) Presidential Support assignment.

3. Separation in a Foreign Country. AR 600-8-24, para 1-28.

a. Normally, officers are not separated in OCONUS (Outside the Continental United States) commands. They are returned to the United States and processed for final separation at CONUS-based separation/transfer points.

b. Exceptions.

- (1) Officer requests separation in a foreign country and the government concerned consents.
  - (a) The officer must obtain all necessary documents for his or her lawful presence in the foreign country prior to separation.
  - (b) The officer's major command (MACOM) may disapprove the request for overseas separation.
- (2) Officers confined in a foreign penal institution pursuant to the sentence of a foreign court.
  - (a) DA must approve separation during confinement.
  - (b) Foreign authorities must take final action on the case before separation.

- (c) The foreign government concerned must consent to the officer's separation in its territory.

4. Referral for Physical Disability Evaluation. AR 600-8-24, para 1-23.

- a. Triggered when it is determined that an officer being processed for REFRAD, separation, retirement, or elimination has a medical impairment that does not meet medical retention standards.
- b. Officers under investigation for an offense chargeable under the Uniform Code of Military Justice (UCMJ) that could result in dismissal or punitive discharge may not be referred for or continue disability processing unless –
  - (1) The investigation ends without charges.
  - (2) The commander exercising court-martial jurisdiction dismisses charges.
  - (3) The commander exercising court-martial jurisdiction refers the charge(s) for trial to a court-martial that cannot adjudge a dismissal or punitive discharge.
- c. Officers pending certain involuntary REFRADs or involuntary elimination under AR 600-8-24, Chapter 4, or who request resignation for the good of the service or separation, resignation or retirement in lieu of elimination, will be processed under both AR 600-8-24 and the medical/physical evaluation board system.
  - (1) If the physical disability evaluation results in a finding of physical fitness, the Army Physical Disability Agency will approve the findings for the Secretary of the Army and forward them for processing with the AR 600-8-24 action.
  - (2) If the physical disability evaluation results in a finding of physical unfitness, both actions will be forwarded to the Secretary of the Army for determination of appropriate disposition.

- d. When an officer is processed for separation or retirement for reasons other than those indicated above, physical disability processing takes precedence.

E. REFRAD. AR 600-8-24, Chapter 2.

- 1. Applies to OTRA officers only.
- 2. Transfer from Active Duty status rather than discharge. Can be voluntary or involuntary.
- 3. Approval Authority.

- a. Separation Approval Authorities (SAA).

- (1) Limited approval authority at installation level.

- (a) General officers in command of Army Medical Centers.

- (b) Commanders of units and installations having general court-martial authority.

- (c) Commanders of:

- (i) Personnel centers

- (ii) Training centers.

- (iii) OCONUS replacement depots.

- (iv) All active Army installations authorized 4,000 or more Active Duty military personnel.

- (2) No denial authority.

- b. Approval Authority varies with type of REFRAD.
4. Voluntary REFRAD.
- a. AR 600-8-24, paras 2-5 through 2-20.
  - b. Examples.
    - (1) Personal Reasons. AR 600-8-24, para 2-5 and 2-6.
    - (2) Hardship. AR 600-8-24, para 2-9 and 2-10.
      - (a) Exists when in circumstances not involving death or disability of a member of the soldier's (or spouse's) immediate family, separation will materially affect the care or support of the family by alleviating undue and genuine hardship.
      - (b) Officer must clearly establish:
        - (i) The hardship is permanent and did not exist prior to entry on Active Duty.
        - (ii) If the hardship existed prior to entry on Active Duty, the condition has since intensified and can only be alleviated by separating from Active Duty.
        - (iii) Upon REFRAD, the officer will be able to eliminate or materially alleviate the condition.
    - (3) Pregnancy. AR 600-8-24, para 2-13 and 2-14.

- (a) Counseling by immediate commander required. Purpose of counseling is to provide information concerning the officer's rights, entitlements, and responsibilities with respect to continued Active Duty or separation.
  - (b) Officers commissioned through funded programs will not be released until completion of their service obligations. When extenuating circumstances exist, officers may request a hardship separation.
  - (c) If before the REFRAD is accomplished a medical officer determines that the pregnancy has terminated for any reason, the authority for separation no longer exists.
- (4) School. AR 600-8-24, paras 2-15 and 2-16.
- (a) An officer who is serving the initial tour of Active Duty and who is not mission essential may request REFRAD to attend a recognized institution of higher learning.
  - (b) Officers commissioned through funded programs will not be released until completion of their service obligations.

5. Involuntary REFRAD.

a. AR 600-8-24, paras 2-21 through 2-42.

b. Examples.

(1) Declination of RA Integration. AR 600-8-24, paras 2-21 and 2-22.

(a) An OTRA officer who was selected for but declined RA integration will be released from Active Duty.

- (b) Applies to officers who entered Active Duty after enactment of the Defense Officer Personnel Management Act (DOPMA); i.e., on or after 15 September 1981.
  - (c) Officers will be released only after all service obligations have been fulfilled.
  - (d) Otherwise, release is effective not later than 90 days after the officer signs the declination statement.
- (2) Maximum Age or Service. AR 600-8-24, paras 2-23 through 2-26.
  - (a) Age.
    - (i) Major general or brigadier general promotable – 62.
    - (ii) Any other commissioned officer – 60. If within 2 years of active federal service retirement eligibility, may be retained on Active Duty until eligible for retirement.
    - (iii) Warrant officers without commission – 62.
    - (iv) Reserve commissioned warrants – 60.
    - (v) Certain medical officers – 68 (with the officer's consent).
  - (b) Service.
    - (i) Generally, Reserve commissioned officers will be released from Active Duty after completing 20 years of active Federal service.

- (ii) Exceptions:
  - (a) Staff College Level School or Senior Service College: retained on Active Duty until completing 2 years of Active Duty following graduation.
  - (b) Command Selection: retained on Active Duty up to 90 calendar days after completing assignment to the designated command position.
  - (c) Lieutenant Colonel: 28 years.
  - (d) Colonel: after 5 years in grade or 30 years, whichever is later.
  - (e) Brigadier General: after 5 years in grade or 30 years, whichever is later.
  - (f) Major General: after 5 years in grade or 35 years, whichever is later.
- (3) Nonselect for Voluntary Indefinite (VI) or Active Guard or Reserve (AGR) Continuation. AR 600-8-24, paras 2-27 and 2-28.
- (4) REFRAD by the Department of the Army Active Duty Board (DAADB). AR 600-8-24, paras 2-31 and 2-32.
  - (a) 10 U.S.C. § 14902: Service Secretaries shall prescribe, by regulation, procedures for the review at any time of the record of any Reserve officer to determine whether that officer should be required, because of substandard performance, misconduct, moral or professional dereliction, or national security concerns, to show cause for retention in an active status.



- (b) The Department of the Army Active Duty Board (DAADB) is the Army's tool for ensuring that only Reserve Component officers who consistently maintain high standards of performance, efficiency, morality, and professionalism are permitted to serve on Active Duty.
  - (i) Initiated locally or at department headquarters level.
  - (ii) Bases for REFRAD similar to bases for administrative elimination: substandard performance, misconduct, moral or professional dereliction, and national security reasons.
  - (iii) Minimal due process. Officer is notified and given an opportunity to respond/rebut. The board reviews the record and the officer's response/rebuttal and makes a recommendation regarding retention or release.
  - (iv) The initiating commander can close the case and stop the REFRAD action upon considering the officer's response/rebuttal.
- (5) Civil Conviction. AR 600-8-24, paras 2-33 and 2-34.
  - (a) An officer found convicted of a criminal offense or who enters a plea of no contest to a criminal offense in any federal or state court may be released from Active Duty immediately when the offense:
    - (i) Is one punishable by a maximum penalty of death or confinement for more than 1 year under the UCMJ. When the offense is not listed or is not closely related to an offense listed in the UCMJ, the maximum punishment authorized by the United States

Code or the District of Columbia Code, whichever is less, applies.

- (ii) Involves moral turpitude, regardless of the sentence received or maximum punishment permissible under any code.
  - (b) Officer is notified and allowed an opportunity to respond only. The case is not referred to a board.
- (6) Officer Basic Course (OBC) Failure. AR 600-8-24, paras 2-37 and 2-38.
- (a) Release from Active Duty and discharge from Reserve commission.
  - (b) Bases.
    - (i) Misconduct.
    - (ii) Moral or professional dereliction.
    - (iii) Academic or leadership deficiencies.
    - (iv) Resigning from the course.
  - (c) Officers are entitled to a faculty board since potential for losing commission exists. Enhanced due process warranted since action can involve more than a loss of Active Duty status. Officers may waive the board and accept the decision of the approval authority with respect to their release/discharge.

F. Resignations. Chapter 3.

1. Unqualified. AR 600-8-24, paras 3-5 and 3-6.

- a. Any officer on Active Duty for more than 90 calendar days may tender an unqualified resignation, unless:
    - (1) Action is pending that could result in resignation for the good of the Service;
    - (2) The officer is under a suspension of favorable action;
    - (3) The officer is pending investigation;
    - (4) The officer is under charges; or
    - (5) Any other unfavorable or derogatory action is pending.
  - b. Normally, resignations will not be accepted unless, on the requested date of separation, the officer has completed his or her applicable service obligation.
- 2. Failure to Meet Medical Fitness Standards When Appointed. AR 600-8-24, paras 3-9 and 3-10.
  - 3. Pregnancy. AR 600-8-24, paras 3-11 and 3-12.
    - a. Counseling required. Purpose is to provide information concerning rights, entitlements, and responsibilities with respect to continued Active Duty or separation.
    - b. Normally, an officer will not tender a resignation for pregnancy until she has completed her initial service obligation incurred from the funded program, if any, under which she was commissioned. Exception: when extenuating circumstances exist, the officer may accept an indefinite appointment in the Reserves in order to complete the service obligation.
  - 4. Resignations for the Good of the Service.
    - a. In Lieu of General Court-Martial. AR 600-8-24, paras 3-13 and 3-14.

- (1) An officer may submit a resignation for the good of the service in lieu of general court-martial when:
    - (a) Court-martial charges have been preferred against the officer with a view toward trial by general court-martial.
    - (b) The officer is under a suspended sentence of dismissal.
  - (2) Tender of the resignation does not preclude or suspend court-martial proceedings. The convening authority may not take action on findings and sentence until DA acts on the resignation request, however.
  - (3) Officers normally receive a characterization of service of Under Other Than Honorable Conditions.
  - (4) Regardless of the characterization of service received, an officer who resigns for the good of the service in lieu of general court-martial is barred (with minor exceptions) from receiving Veteran's Affairs benefits.
- b. Homosexual Conduct. AR 600-8-24, paras 3-15 and 3-16.
- (1) Officers can tender resignations for the good of the service due to homosexual conduct prior to general court-martial charges being preferred or administrative elimination proceedings being initiated.
  - (2) An officer is not precluded or suspended from disciplinary proceedings by submitting a resignation for the good of the service due to homosexual conduct.
  - (3) Officers normally receive a characterization of service of Under Other Than Honorable Conditions.

- (4) Regardless of the characterization of service received, an officer who resigns for the good of the service due to homosexual conduct is barred (with minor exceptions) from receiving Veteran's Affairs benefits.

G. Eliminations. AR 600-8-24, Chapter 4.

1. Privilege of Service.

- a. Individuals are permitted to serve as commissioned officers in the military service because of the special trust and confidence the President and the United States have placed in their patriotism, valor, fidelity and competence.
- b. Commissioned officers are expected to display responsibility commensurate to that special trust and confidence and to act with the highest integrity at all times.
- c. It is DOD policy to separate those officers who will not or cannot exercise the responsibility, fidelity, integrity, or competence expected of them.
- d. See National Defense Authorization Act, Fiscal Year 1998, for requirement of "exemplary conduct" by commanding officers (and others in authority).

- (1) All commanding officers (and others in authority) are required:

- (a) To show in themselves a good example of virtue, honor, patriotism, and subordination;
- (b) To be vigilant in inspecting the conduct of all persons who are placed under their command;
- (c) To guard against and suppress all dissolute and immoral practices, and to correct, according to the laws and regulations of the Army, all persons who are guilty of them; and

- (d) To take all necessary and proper measures, under the laws, regulations, and customs of the Army, to promote and safeguard the morale, the physical well-being, and the general welfare of the officers and enlisted persons under their command or charge.

(2) Issues.

- (a) How broad is this provision?
- (b) How does this provision affect a commander's authority and discretion in disciplining members of the command?
- (c) Does a commander's failure to satisfy the requirement for "exemplary conduct" form a basis for administrative elimination? Does such failure constitute substandard performance or professional dereliction?

2. Substandard Performance. AR 600-8-24, para 4-2a.

- a. Failure to keep pace with contemporaries.
- b. Apathy, defective attitudes.
- c. Failure of a course at a service school for academic reasons.
- d. PT or weight failure.
- e. HIV Positive within 180 days of entering Active Duty.

3. Misconduct, Moral or Professional Dereliction, or in the Interests of National Security. AR 600-8-24, para 4-2b.

- a. Discreditable or intentional failure to meet personal financial obligations.

- b. Mismanagement of personal affairs.
  - c. Intentional omission or misstatement of fact in official statements or records.
  - d. Acts of personal misconduct (including acts committed while in a drunken or drug intoxicated state).
  - e. Intentional neglect or failure to perform duties.
  - f. Conduct unbecoming.
  - g. Drug dependent or misconduct involving drugs. (Note: elimination action must be initiated.)
  - h. Loss of professional qualifications.
4. Derogatory Information. AR 600-8-24, para 4-2c.
- a. Required record review.
  - b. Triggered by:
    - (1) Punishment under Article 15, UCMJ.
    - (2) Conviction by court-martial.
    - (3) Denial of security clearance.
    - (4) Relief for cause OER.
    - (5) OMPF-filed administrative reprimand.
    - (6) Failure of a course at a service school.

- c. Must review officer's overall record for consideration of terminating his or her appointment.
- 5. Homosexual Conduct. AR 600-8-24, para 4-2b(6), 4-22, and 4-23.
- 6. Procedural Issues.
  - a. Initiated by DA or General Officer Show Cause Authority (GOSCA).
  - b. Administrative "Double Jeopardy".
    - (1) Officers will not be considered for involuntary administrative elimination because of conduct that has been the subject of judicial proceedings that resulted in an acquittal.
    - (2) Generally, no officer will be considered for involuntary administrative elimination because of conduct that has been the subject of administrative elimination proceedings that resulted in a final determination that the officer should be retained. Exceptions:
      - (a) New evidence.
      - (b) Fraud.
      - (c) Subsequent conduct.
        - (i) Substandard Performance: Must wait one year if required to show cause for retention for the same reason(s).
        - (ii) Misconduct, Moral or Professional Dereliction, Homosexual Conduct, or in the Interest of National Security: May again be required to show cause at any time.



c. Notification and Rebuttal.

- (1) Notified by initiating authority.
- (2) Notice must identify the reason(s) for elimination.
  - (a) May be combined.
  - (b) If combined, separate findings are required for each separation basis identified.
- (3) Notice also offers the officer the following options.
  - (a) Resignation in Lieu of Elimination (Regulatory).
  - (b) Request for Discharge (RA) (10 U.S.C. § 1186).
  - (c) Retirement in Lieu of Elimination (if eligible) (10 U.S.C. § 1186).
- (4) Officer, whether probationary or nonprobationary, entitled to submit a written response or rebuttal to the headquarters initiating the action. Decision to retain at any point stops action.

d. Characterization of Service.

- (1) Honorable, General, or Under Other Than Honorable Conditions.
- (2) Normally based on a pattern of behavior and duty performance rather than an isolated incident.
- (3) If the **sole** reason for elimination is substandard performance, the officer is entitled to an Honorable discharge.

- e. Probationary officer.
  - (1) Notification.
  - (2) Rebuttal to headquarters that initiated action.
  - (3) Action by Secretary of the Army.
  - (4) Probationary officer not entitled to board unless Under Other Than Honorable discharge is recommended.
  - (5) If officer loses probationary status during processing, must process as nonprobationary.
- f. Nonprobationary officer.
  - (1) Notification.
  - (2) Rebuttal to headquarters that initiated action.
  - (3) Referral to Board of Inquiry.
  - (4) Board of Review.
  - (5) Action by Secretary of the Army.
- g. Referral to Board of Inquiry.
  - (1) Full due process.
  - (2) Composition.
    - (a) At least three voting officers.

- (i) On Active Duty List or Reserve Active Status List.
  - (ii) Same military service as respondent.
  - (iii) Colonel or above, senior in grade and rank to the respondent.
- (b) Others: Legal advisor, recorder, and respondent's counsel. All nonvoting members.
- (3) Determinations.
  - (a) Case decided only on the evidence received or developed during open hearings.
  - (b) Voting conducted in closed session with only voting members in attendance.
  - (c) All findings and recommendations shall be determined by majority vote.
  - (d) If Board of Inquiry determines that retention is warranted, the case is closed.
  - (e) If Board of Inquiry determines that retention is not warranted, case goes to a Board of Review.

h. Board of Review.

- (1) Convened at DA level.
- (2) Limited due process.
- (3) Composition. Same as Board of Inquiry.

(4) Recommends either retention or elimination.

(a) If retention warranted, case closed.

(b) If elimination warranted, case forwarded to Service Secretary with recommendation for final action.

H. Miscellaneous Separations. AR 600-8-24, Chapter 5.

1. Lack of Jurisdiction - court orders release from Active Duty.
2. Chaplain Loses Professional Qualifications - if no elimination under Chapter 4 (see above).
3. Officers Twice Nonselected for Promotion - unless selective continuation, over 18 years of service, or retirement.
4. Nonselection for Field Promotion – second lieutenant and warrant officer (WO1); field promotion; lieutenant colonel commander; appeal to general officer.
5. Conviction by Foreign Tribunal - sentence is 6 months or more.
6. Dropped From the Rolls – Active Duty or retired when confined, absent without leave (AWOL), or loses retired pay.
7. Dismissed by General Court-Martial - after appellate review is complete.

I. Retirement. AR 600-8-24, Chapter 6.

1. Voluntary Retirement (VR) – General Court-Martial Convening Authority (GCMCA) approval.
2. VR in Lieu of Mandatory - i.e., pending REFRAD, elimination, or nonselection.

3. Retirement in lieu of elimination, in cases involving misconduct or moral or professional dereliction, **requires** referral to Army Grade Determination Board.
4. Retirement in Lieu of PCS - at least 19 years, 6 months time in service; must submit within 30 days of notice of PCS.
5. Mandatory Retirement - maximum age or service.
6. Selective Early Retirement - based on selection by SERB.

## **XVI. COMMANDER'S RESPONSIBILITIES.**

- A. Documentation.
- B. Ensure counseling requirements of AR 600-8-24, para 1-12 properly completed.
- C. Take the Proper Action. In determining what action to take when faced with officer misconduct or poor performance, the commander should decide:
  1. Should the officer be retained on active duty?
  2. Should the officer be eligible for reappointment or recall to active duty at some later time?
  3. Should the officer lose his or her commission?

## **XVII. CONCLUSION.**

# ADMINISTRATIVE AND CIVIL LAW DEPARTMENT BASIC COURSE DESKBOOK

## CHAPTER O

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*questions regarding this outline, contact LTC Daniel Culver, U.S. Army Judge Advocate  
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## **Outline of Instruction**

### **I. INTRODUCTION & REFERENCES.**

- A. AR 15-180, Army Discharge Review Board.
- B. AR 15-185, Army Board for Correction of Military Records.
- C. AR 20-1, Inspector General Activities and Procedures.
- D. AR 27-10, Chapter 20, Complaints Under Article 138, UCMJ.
- E. AR 27-20, Chapter 9, Claims under Article 138, UCMJ.
- F. Military Whistleblowers Act, Title 10, U.S.C. § 1034.
- G. Department of Defense Directive 7050.6, Military Whistleblower Protection (12 August 1995).
- H. Department of Defense Directive 6490.1, Mental Health Evaluations of Members of the Armed Forces (1 October 1997).
- I. Department of Defense Instruction 6490.4, Requirements for Mental Health Evaluations of Members of the Armed Forces (28 August 1997).

### **II. ARTICLE 138, UCMJ (AR 27-10).**

- A. Article 138, UCMJ:

*Any member of the armed forces who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer, is refused redress, may complain to any superior commissioned officer, who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made. The officer exercising general court-martial jurisdiction shall examine into the complaint, and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, send to*

*the Secretary concerned a true statement of that complaint, with the proceedings and thereon (emphasis added).*

- B. Purpose: To provide a way for soldiers to complain when they think they have been wronged by their commanding officers.
- C. Army policies relating to Article 138 complaints:
  - 1. Resolution of complaints at the lowest level.
  - 2. Begin with assumption command acted properly.
  - 3. Complainant does not participate after filing complaint.
- D. Key definitions.
  - 1. Member of the armed forces: Member of the armed forces on active duty or inactive duty for training and subject to the UCMJ.
  - 2. Commanding officer: Any officer in complainant's chain of command, up to and including the first officer exercising general court-martial jurisdiction over the complainant, authorized to impose Article 15 punishment.
  - 3. Wrong. Discretionary act or omission taken under color of authority which adversely affects complainant personally, that is:
    - a. in violation of law or regulation;
    - b. beyond the commander's authority;
    - c. arbitrary, capricious, or an abuse of discretion, or;
    - d. materially unfair.
  - 4. Redress.
    - a. Action by any commander that revokes the act complained of or restores complainant's rights, privileges, property, or status lost as a result of the wrong.
    - b. Redress usually in the form of a "make whole" remedy.



5. Superior commissioned officer.
  - a. A commissioned officer in the current chain of command.
  - b. Senior to the complainant in grade, rank or position.
- E. Initial assessment of Article 138 complaints:
  1. Is the subject matter appropriate? Not when:
    - a. Review provided by UCMJ (Article 15 punishment, court martial).
    - b. AR 15-6 formal board procedure followed (administrative separation boards).
    - c. Army regulation specifically authorizes an administrative appeal.
  2. Even if subject matter is appropriate, complaint may be deficient. Examples:
    - a. Failure to seek redress from Commander.
    - b. Untimely complaint (waivable defect).
    - c. Complainant has left active duty or active Reserve status (non-waivable defect).
- F. Complaint procedures.
  1. Request for Redress.
    - a. Written request for redress from the soldier to the commander.
    - b. Response by commanding officer.
      - (1) Commander has 15 days to respond.
      - (2) No response may be considered a denial of the request.
  2. Complaint: If redress refused, soldier may submit written Article 138 complaint [Example - Appendix A].

- a. Soldier must submit complaint within 90 days of discovery of wrong excluding period when request for redress was in the hands of the commander.
  - b. The complaint is submitted to complainant's immediate superior commissioned officer.
3. The formal complaint goes up the chain of command to the officer exercising general court-martial jurisdiction (GCMCA) over the commanding officer concerned.
- a. Any commander through whom complaint is forwarded may grant redress.
  - b. Complainant may orally withdraw complaint prior to receipt by GCMCA. After GCMCA receives the complaint, a written request for withdrawal is required.
  - c. Upon receipt, GCMCA will examine the complaint.
4. The GCMCA must act **personally** on the complaint by taking one of the following actions:
- a. Return inappropriate subject matter complaints. Deficient complaints may be returned to the complainant or waived.
    - (1) The following deficiencies may be waived for good cause:
      - (a) Complaint not submitted within 90 days of discovery of wrong.
      - (b) Redress not requested and refused.
      - (c) Repetitive complaint.
    - (2) The following deficiencies may not be waived:
      - (a) Complainant not on active duty or inactive duty for training when complainant presented.
      - (b) Wrong was not a discretionary act or omission.

- (c) Wrong was not committed by complainant's commander.
  - (d) Wrong did not affect complainant personally.
  - (e) Complaint does not adequately identify a respondent or the alleged wrong.
- b. Grant or deny redress.
- c. If redress beyond GCMCA's authority to provide, forward case to command or agency that can.
- d. GCMCA then notifies soldier in writing of action taken on the complaint.
- 5. GCMCA then forwards complaint:
  - a. After action, GCMCA must forward complaint to HQDA even if the requested relief is granted.
  - b. Soldier may voluntarily withdraw the complaint.

G. JAG Involvement:

- 1. Soldier entitled to consultation and advice from military attorney.
- 2. Respondent commanders may consult their judge advocate.

### **III. ARMY DISCHARGE REVIEW BOARD (DRB) (10 U.S.C. § 1553; DOD DIRECTIVE 1332.28; AR 15-180).**

A. 10 U.S.C. § 1553:

*The Secretary concerned shall . . . establish a board of review, consisting of five members, to review the discharge or dismissal (other than by sentence of a general court-martial) of any former member of an armed force . . .*

*A board established under this section may . . . change a discharge or dismissal, or issue a new discharge, to reflect its findings. . . .*

B. Purpose: The purpose of the review is to determine whether the discharge was granted in a proper manner and was fair and equitable considering the regulations in effect at the time of the discharge.

C. Review procedures.

1. Application for Review.

- a. Submitted on DD Form 293.
- b. Include statements, affidavits, or documents.
- c. Request specific relief.
  - (1) Change in character of discharge.
  - (2) Change in reason for discharge.

2. Must be made within 15 years of date of discharge or dismissal.

D. Review standards.

1. Propriety of Discharge.

- a. A discharge shall be deemed proper unless:
  - (1) Error in fact, law, procedure or discretion at time of issue and applicant was prejudiced; or,
  - (2) Retroactive change in policy requires change in the discharge.

2. Equity of Discharge.

- a. A discharge shall be deemed equitable unless:
  - (1) Prior policies and procedures differ materially from those currently applicable; and,
    - (a) New policies and procedures represent a substantial enhancement of rights; and,

(b) Application of current policies and procedures would cast doubt on validity of discharge.

(2) Discharge was inconsistent with standards of discipline then in use.

(3) Relief is warranted on basis of applicant's service record.

(4) Boards look especially hard at "declined Article 15" misconduct resulting in administrative separation rather than courts-martial.

E. Procedural rights of applicants.

1. Record Review.

2. Hearing before Board (O-6 Officers-Extra Duty).

a. May be represented by attorney. (25% relief rate when applicant appears before Board panel--overall relief rate is 14%.)

b. Rules of evidence do not apply.

c. Applicant may offer evidence, call witnesses or testify.

3. Board deliberations, conclusions and opinions.

a. Presumption of regularity in the conduct of government affairs. Burden of proof on applicant.

b. Findings based on majority vote in closed session.

c. Decisional Document prepared.

F. JAG Involvement.

1. Legal advisor to DRB.

2. Advice to soldiers pending discharge and eligible legal assistance clients. Veteran's organizations (using non-attorney representatives) and private bar provide representation.

#### **IV. ARMY BOARD FOR CORRECTION OF MILITARY RECORDS (10 U.S.C. § 552; AR 15-185).**

A. 10 U.S.C. § 1552:

*The Secretary of a military department may correct any military record of the Secretary's department when the Secretary considers it necessary to correct an error or remove an injustice. [S]uch corrections shall be made by the Secretary, acting through boards of civilians of the executive part of the military department. . . . Except when procured by fraud, a correction made under this section is final and conclusive on all officers of the United States.*

B. Purpose:

1. To correct military records when necessary to correct an error or remove an injustice and pay claims for related lost pay and/or benefits.
2. Allows for relief outside of normal processes without private bills of relief in Congress.
3. Some of the issues considered by the ABCMR:
  - a. Separations.
  - b. Consideration for promotions.
  - c. Evaluation Reports.
  - d. Pay and Allowances.
  - e. Memoranda of Reprimand.

C. Composition of the Board: Not less than three civilian officers or employees of the Department of Army (GS13+) [Extra Duty].

D. Procedures.

1. Application for correction submitted on DD Form 149. Signed and sworn.

2. Within three years of discovery of alleged error or injustice [waived in interest of justice/good cause]. One appellate court has decided that SSCRA tolls the statute of limitations on BCMR cases, but laches still applies. *See* *Detweiler v. Pena*, 38 F.3d 591, 595 (D.C. Cir. 1994); *Neptune v. United States*, 1997 WL 412110 (Fed. Cl. 1997); and *Cornetta v. United States*, 851 F.2d 1372, 1378 (Fed. Cir. 1988).
- E. Action by the Board. (About 35 percent of boarded cases given some relief.)
1. Cases may be denied based on:
    - a. Insufficient evidence presented by applicant. [Denial on this basis nonprejudicial; applicant may refile claim.]
    - b. Failure to exhaust administrative remedies.
    - c. Failure to timely file application.
  2. Burden of Proof on Applicant.
  3. Board can, but need not, authorize a hearing.
  4. Applicant may present evidence, witnesses or testify.
  5. Closed deliberations.
  6. Written findings, conclusions and recommendations.
    - a. Delegated authority to take final action in certain cases.
    - b. Forward record to the Secretary of the Army for decision.
  7. Reconsideration may be granted only for newly discovered evidence.
  8. Electronic Database of recent ABCMR decisions online at <http://arba.army.pentagon.mil/linkspage.htm>.
- F. ABCMR Processing Time.
1. Active duty cases receive priority--about 120 days

2. Average for all cases--less than 10 months.

G. Appellate Review Type of Federal Court depends on type of claim:

1. Non-monetary relief - U.S. District Courts. *Kreis v. Secretary of the Air Force*, 866 F. 2d 1508, 1511 (D.C. Cir. 1989); *Chappell v. Wallace*, 462 U.S. 296, 103 S. Ct. 2362, 76 L.Ed.2d 586 (1983).
2. Monetary relief/Back Pay - U.S. Court of Federal Claims.

Standard of Review. Relief only granted when an action was “arbitrary, capricious or contrary to agency regulation or statute by weight of substantial evidence”

H. JAG Involvement.

1. Legal Assistance in preparing application for relief.
2. OTJAG, AD LAW, advises ABCMR.

## V. INSPECTOR GENERAL SYSTEM (AR 20-1).

A. Assistance Function. [Chapter 7, AR 20-1]

1. Assist soldiers and civilian employees with complaints, allegations, and requests for assistance concerning matters of Army interest [Inspector General Action Request (IGAR) is the form and the term commonly used by IG personnel to document assistance requests].
2. Chain of Command redress not required, unless specific redress procedures provided by statute or regulation (NCOER/OER appeals, Nonjudicial punishment, Article 138 complaints, Reports of Survey, Relief for Cause, etc.). Once redress procedure used, IG limited to determine if soldier afforded minimal due process. [See AR 20-1, para. 7-3.]
3. Resolution of soldier/civilian assistance complaints/concerns:
  - a. Confidential Inquiry, subject to FOIA. Don't have to tell command why you wish to see the IG, but must seek permission to visit IG during duty hours [AR 20-1, paras. 1-12, 7-1].



- b. IG Courses of Action:
  - (1) Referral to Chain of Command/Appropriate Staff Agency (e.g., pay complaint to DFAS, nonsupport) [AR 20-1, para 7-4].
  - (2) IG Inquiry to resolve complaint (informal). [AR 20-1, para. 7-3.]
  - (3) IG Investigation. [Chapter 8, AR 20-1].
- c. IG encouraged to coordinate with local SJA.
- d. IG required to provide verbal or written final response to requester [AR 20-1, para. 6-9].
- e. Appeal of IG response available to next higher command IG [AR 20-1, para. 6-10].
- f. DOD IG Hotline for “fraud, waste and abuse” -- 1-800-424-9098. [DAIG Hotline: 1-800-752-9747]

B. Investigation Function [Chapter 8, AR 20-1].

- 1. IG has jurisdiction to investigate [AR 20-1, para. 8-3]:
  - a. Violations of policy, regulation or law.
  - b. Mismanagement, unethical behavior, or misconduct, which, if true, would be of concern to the directing authority.
- 2. IG does NOT investigate:
  - a. Alleged criminal misconduct (except in some cases of conduct unbecoming an officer, dereliction of duty or punitive regulation violation.
  - b. Alleged individual misconduct that would likely result in adverse action against the individual, if substantiated.
  - c. JAGC professional misconduct/mismanagement [AR 27-1].

- d. Only HQDA (DAIG) may direct IG investigation against General Officers, General Officer selectees, and SES civilians

### 3. Conduct of IG Investigations

- a. Limited to matters approved by Directing Authority-fact-finding only. IG is not law enforcement officer or prosecutor. Aimed primarily at the collection and assessment of command, management, or leadership concerns and breaches of military professional ethics.
- b. Due Process Requirements
  - (1) Notice to Subjects/Suspects of the nature of the allegations, and to their supervisors/commanders.
  - (2) Appropriate rights warnings.
  - (3) Confidentiality of statements by witnesses, subjects, and suspects.
  - (4) Notice to Subjects/Suspects of the results of the investigation upon completion of the Report of Investigation (ROI), and their commanders/supervisors.
  - (5) DA personnel who are witnesses or subjects may not refuse to answer IG investigation questions unless they are (a) incriminating; (b) privileged communications; or (c) would violate their rights to union representation.
- c. Command IG will review the ROI, forward the report to the supporting SJA for legal review, and submit with recommendations to the directing authority.
- d. IGs do not make policy recommendations or suggest adverse action against individuals.
- e. Directing authority or their designated delegated deputy commander or chief of staff (GO-level) may approve/disapprove all or in part of the ROI and take action within their authority and responsibility.

C. Military Whistleblower Protection Act [Title 10, U.S. Code Section 1034, DOD Dir. 7050.6].

1. Military commanders and personnel are prohibited from restricting any military member in any manner from lawfully communicating with a Member of Congress or member of an audit, inspection, investigation, or law enforcement organization within DOD, and any other person or organization (including the chain of command) designated under Component regulations or established administrative procedures. [See AR 20-1, para. 1-1a, and AR 600-20, Army Command Policy, paras. 5-8c and 5-12 (15 Jul 99).]
2. Protected communications include those by a military member who complains or discloses information the member reasonably believes constitutes evidence of:
  - a. Violation of law or regulation, including a law or regulation prohibiting sexual harassment or unlawful discrimination (race, color, religion, sex or national origin).
  - b. Mismanagement, gross waste of funds, abuse of authority, or a substantial and specific danger to public health or safety.
3. IG is required to investigate allegations of individuals taking or threatening to take unfavorable personnel actions against or withholding or threatening to withhold favorable personnel actions as a reprisal against a member of the Armed Forces for communicating with a Member of Congress or member of an audit, inspection, investigation, or law enforcement organization within DOD. Complaint must be filed with an IG officer to get reprisal protection. IGs and SJAs are to so inform complainants.
4. Reprisal Test: Would the personnel action in question have been taken, withheld, or threatened if the protected disclosure had not been made?
5. Adverse personnel actions include command referrals for mental health evaluation UP DOD Dir. 6490.1, "Mental Health Evaluations of Members of the Armed Forces," 1 Oct. 1997. [See APPENDIX D, which includes a copy of the Military Mental Health Evaluation Protection Act, Commanders' and Soldiers' Counsel Checklists and Sample Soldier Notice.]
6. Military violators of this Act are subject to prosecution under Article 92, UCMJ. [See DOD Directive 7050.6, and AR 20-1, para. 1-10.]

7. Military whistleblower violations are investigated by the DOD IG or the military service IGs. [See DOD Directive 7050.6, and AR 20-1, para. 8-9.] Investigations must be conducted outside the immediate chain of command of the complainant and the alleged retaliating official.
8. No investigation is required if the allegation is submitted **more than 60 days** from the time the service member became aware of the personnel action that is the subject of the reprisal allegation, or that the action complained of took place during combat. A Commander can elect to continue such an investigation, even if it is over 60 days from the time the complaint is made from the time the reprisal or prohibited action took place.
9. The investigation must be completed **within 90 days** of the original whistleblowing allegation being received by the IG, or the IG will so inform the Secretary of Defense and the complainant, in writing, of the estimated date of ROI completion. A copy of the whistleblower ROI will be forwarded to the complainant [w/o interview summaries or documents, unless requested by the complainant] and Secretary of Defense **within 30 days from completion of the ROI**. The ROI given to the whistleblower complainant will include all factual findings and recommendations, subject to security classification and FOIA limitations.
10. Military member whistleblower reprisal complaint resolutions by a Military Service Secretary may be reviewed by a BCMR, and the Secretary of Defense. (DOD Directive 7050.6).
11. Military Whistleblower complaints do not create a federal private cause of action against the military; they are strictly an administrative remedy. *See* Acquisto v United States, 70 F.3d 1010, 1011 (8th Cir. 1995); Alasevich v. United States Air Force Reserve, 1997 WL 152816, \*6 (E.D. Pa. 1997); and Hernandez v. United States, 38 Fed. Cl. 532 (Fed. Cl. 1997).

# APPENDIX A

## [Sample Article 138 Complaint]

DEPARTMENT OF THE ARMY  
COMPANY B, 5/20TH INFANTRY  
1ST INFANTRY DIVISION (MECHANIZED)  
FORT RILEY, KANSAS 22222

AFKC-IN

13 October 1997

MEMORANDUM THRU Commander, Company B, 5/20th Infantry, 1st Infantry Division (Mechanized), Fort Riley, Kansas 22222

FOR Commander, 5/20th Infantry Battalion, 1st Infantry Division (Mechanized), Fort Riley, Kansas 22222

SUBJECT: Complaint of Wrong (Article 138, UCMJ)

1. I, SFC Cindy A. Crawford, 000-11-3333, am a member of the United States Army on active duty, subject to the Uniform Code of Military Justice, and currently assigned to Company B, 5/20th Infantry Battalion, 1st Infantry Division (Mechanized), Fort Riley, Kansas. On 12 September 1997 while assigned to my present unit I was wronged by my commanding officer, CPT Phoebe Doright, Commander, B Company, 5/20th Infantry Battalion, 1st Infantry Division (Mechanized), Fort Riley, Kansas. I made a written request for redress to CPT Doright on 14 September 1997, but on 19 September 1997 he refused to grant it. The request for redress and her response are attached (Encl). I therefore submit this complaint against CPT Doright under the provisions of Article 138, UCMJ, and Army Regulation 27-10.

2. The wrong which is the subject of this complaint is improper denial of annual leave. The circumstances are as follows: On 3 September 1997, CPT Doright requested volunteers for a domestic action work project the following Saturday at her favorite charity-the Junction City Toxic Waste Fund. Because I already had other plans for the date of the project, I did not participate. On 12 September 1997, I requested annual leave to attend my hometown annual Halloween celebration in Pigs Tail, North Carolina. Captain Doright denied my leave request although I have enough leave accrued to cover the requested period.

3. CPT Doright's action in denying my leave request was improper because it was only done in retaliation for my refusal to participate in the volunteer program. CPT Doright's actions also are contrary to paragraph 2-7e, AR 630-5, which advises commanders to place special emphasis on granting holiday leave.

4. I hereby ask as redress that you authorize my leave from 26 October through 2 November 1997.

Encl

CINDY A. CRAWFORD  
000-11-3333  
SFC, Co B, 5/20th IN  
1st IN Div (Mech)

# **26TH ADMINISTRATIVE LAW FOR MILITARY INSTALLATIONS**

## **ARMY ADVERSE ADMINISTRATIVE ACTIONS**

### **CHAPTER 30**

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## **Outline of Instruction**

### **I. CONSOLIDATED LIST OF REFERENCES.**

- A. AR 190-5, Motor Vehicle Traffic Supervision.
- B. AR 350-15, The Army Physical Fitness Program.
- C. AR 380-67, Personnel Security Program.
- D. AR 600-8-2, Suspension of Favorable Personnel Actions (FLAGS).
- E. AR 600-8-10, Leaves and Passes.
- F. AR 600-8-19, Enlisted Promotions and Reductions.
- G. AR 600-9, The Army Weight Control Program.
- H. AR 600-20, Army Command Policy and Procedures.
- I. AR 600-37, Unfavorable Information.
- J. AR 601-280, Total Army Retention Program, w/ IO3 (November 1993).
- K. AR 635-200, Personnel Separations - Enlisted Personnel.

### **II. INTRODUCTION.**

Commanders have a spectrum of administrative military personnel actions which they can use to motivate, improve, and rehabilitate soldiers whose performance is unsatisfactory or who exhibit other problems which interfere with duty performance or the unit's mission.

If soldiers fail to respond to motivation and rehabilitation, other administrative tools are available which commanders can use to take appropriate remedial or adverse action, or to separate soldiers from the Army.

This outline reviews the twelve administrative actions short of administrative separation which you can expect to see most often. Each section lists the appropriate references. The chart at Appendix A lists these actions in a tabular form. Enlisted separations are addressed by the Criminal Law Division in a separate outline.

This outline should be supplemented by reference to the applicable regulation, to appropriate local regulations and policies, and any guidance from senior commanders.

### **III. DUE PROCESS OF LAW - THE STARTING POINT.**

#### **A. The Constitution.**

1. Bill of Rights (e.g., Fourth, Fifth, and Sixth Amendments) generally inapplicable to military administrative proceedings.
2. When challenged in court on alleged denial of constitutional due process (fifth amendment), military position is “there is no constitutional life, liberty, or property interest affected by our administrative actions.”

#### **B. Our Regulations.**

1. Must follow procedures in regulations -they are more than “guidelines.” Although federal district courts are very hesitant to second guess armed forces on substance of decisions, they will grant relief if we fail to follow our own regulations.
2. “Minimum” due process: notice of allegations and an opportunity to be heard.



#### **IV. SUSPENSION OF FAVORABLE PERSONNEL ACTIONS (FLAGS).**

- A. Reference. AR 600-8-2, Suspension of Favorable Personnel Actions (FLAGS), 30 Oct 87. I01, Apr 94.
- B. Purpose.
  - 1. A suspension of favorable personnel actions (or “flag”) is an administrative hold placed on a soldier which precludes the processing of nearly all favorable personnel actions (e.g., promotion, awards, school attendance, payment of reenlistment bonuses, etc.) while the soldier’s chain of command conducts an investigation, determines whether or what adverse action to take against the soldier, and completes the adverse action.
  - 2. A flag itself is not an adverse action, because it can be removed as easily as it can be initiated. But since it prevents virtually all favorable action on/for a soldier, it can have a very adverse effect on the soldier’s career.
- C. Types. There are two types of flags, “transferable” and “nontransferable” actions. The impact of the action will vary depending upon the flag’s basis and type.
  - a. Regular (“non-transferable”) flags prevent appointment, reappointment, reenlistment, extension, entry on active duty or active duty for training, reassignment, promotion or reevaluation for promotion, awards and decorations, attendance at civil or military schools, unqualified resignation or discharge, retirement, advance or excess leave, payment of enlistment or selective reenlistment bonus, assumption of command, family member travel to an overseas command and command sponsorship of family members overseas when sponsor is overseas.

- b. APFT (Army Physical Fitness Test) failure (“transferable”) flags prevent promotion, reenlistment, and extension.
- c. Weight control (“transferable”) flags prevent attendance at schools, promotions, assumption of command, awards and decorations, and reenlistment or extension. *See* Message, DAPC-MSP, 011500Z MAR 88, subject: Suspension of Favorable Personnel Actions (FLAGS) - FLAG Conversion Message Number 3.

D. Procedure.

- 1. Any commander (or general officer staff head) directs the flag.
- 2. Battalion S1 prepares DA Form 268, Report to Suspend Favorable Personnel Action (FLAG), and submits SIDPERS transaction. Properly administered, a flag has two components:
  - a. A SIDPERS (Standard Installation/Division Personnel System) transaction that codes a soldier’s records in the Army’s automated personnel database and prevents favorable personnel transactions.
  - b. Battalion S1 (or equivalent) unit management of the flagging system, to keep unit leadership and unit personnel clerks aware of the flag, and lift it when appropriate.
- 3. Unit notifies soldier.
- 4. Unit or battalion manages SIDPERS C95 report, which lists all flagged soldiers.
- 5. Lift flag when appropriate.

E. Approval Authority. Any commander or general officer staff head.

- F. Appeal. None.
- G. Records. DA Form 268 maintained only so long as soldier is flagged. No permanent record of flag itself, although there may well be a permanent record of the underlying adverse action which required the flag.

## **V. EXTRA TRAINING.**

- A. Reference. AR 600-20, para 4-6b.
- B. Purpose. An effective, nonpunitive corrective measure.
- C. Procedure. No formal procedure.
  - 1. Any leader may order a soldier to train to overcome a deficiency.
    - a. Must be directly related to the deficiency.
    - b. Must be aimed at improving the soldier's performance.
  - 2. Not punishment; must stop when deficiency is overcome.
- D. Approval Authority. Any commander. An “inherent power of command.” May be delegated.
- E. Appeal. No specific procedure.
- F. Records. None; *however*. . .
  - 1. “Deficiencies *satisfactorily corrected* by means of training and instruction will be not noted in the official records of the soldier concerned.” AR 600-20, para 4-6b(2) (emphasis added).

2. If the problem merits it, consider documenting with a counseling with a view towards separation. Destroy the counseling if, after a reasonable period, the problem truly is cured; otherwise, proceed to separation.

## **VI. REVOCATION OF PASS PRIVILEGES.**

- A. Reference. AR 600-8-10, Chapter 5, Section XIV.
- B. Purpose. Commanders should grant passes (defined as short, nonchargeable, authorized absences from post or place of duty during normal off-duty hours) to those soldiers whose performance of duty and conduct merits approval. If a soldier's performance of duty and conduct do not merit approval, do not approve a pass.
- C. Procedure. No formal procedure. Regular passes usually do not require a DA Form 31 (although one may be used). If a soldier's pass privileges are revoked, the soldier's immediate commander or his or her representative should inform the soldier in writing. If DA Form 31 is used for regular passes, indicate disapproval on the form.
- D. Approval Authority. Any commander.
- E. Appeal. No special procedures.
- F. Records. None required. Consider documenting with a counseling with a view towards separation.

## **VII. COUNSELING WITH A VIEW TOWARDS SEPARATION.**

- A. Reference. AR 635-200, para 1-18.

- B. Purpose. An administrative prerequisite to many administrative separations, counseling with a view towards separation serves as a “final warning” to a soldier to improve performance or face discharge. It also is an attempt by the Army to protect its investment in the soldier’s recruiting and training costs. *Compare with* general counseling (AR 600-20, para 2-1e) (basic leadership tool used to assist soldiers in professional growth; not necessarily adverse).
- C. Procedure.
1. **May** be used at any time. As a prerequisite to processing a soldier for discharge under the following provisions of AR 635-200, the command must complete at least one recorded counseling:
    - a. Chapter 5, Involuntary Separation Due to Parenthood;
    - b. Chapter 5, Personality Disorder;
    - c. Chapter 11, Entry Level Performance and Conduct;
    - d. Chapter 13, Unsatisfactory Performance; or
    - e. Chapter 14, Minor Disciplinary Infractions or Pattern of Misconduct.
  2. The officer or NCO counseling the soldier will advise the soldier of:
    - a. The reason for counseling;
    - b. The fact that separation may be initiated if behavior continues;
    - c. The type of discharge that could result from possible separation; and
    - d. The effect of each type of discharge.

- D. The command must give the soldier a reasonable opportunity to overcome the deficiencies.
- E. Approval Authority. None. Counseling may be conducted by “a responsible person.” AR 635-200, para 1-18b.
- F. Appeal. None.
- G. Records.
  - 1. To be used as a prerequisite for separation, each counseling session must be recorded in writing.
  - 2. DA Form 4856 (General Counseling Form) normally should be used for this purpose.
  - 3. Filed in unit personnel files - not in MPRJ or OMPF (Official Military Personnel File). No permanent, long-term record, unless incorporated into separation action. Maintain until soldier departs unit; destroy one year later IAW MARKS.
  - 4. Commander's Notebook. Beware of Freedom of Information Act access. Generally, no right to access under FOIA if:
    - a. Prepared voluntarily; and
    - b. Used only as a memory aid by preparer.
  - 5. Article 15 (DA Form 2627) does not satisfy requirement in and of itself. Solution: have legal clerk/legal center prepare DA Form 4856 to accompany each Art 15.

## **VIII. REHABILITATIVE TRANSFER.**

### **A. References.**

1. AR 635-200, para 1-18c.
2. Message, Headquarters, Dep't of Army, DAPE-MPE, subject: Attrition of First-Term Enlisted Soldiers (121752Z Dec 96) (ALARACT 119/96).
3. Message, Headquarters, Dep't of Army, DAPE-MPE, subject: Attrition of First-Term Enlisted Soldiers--Supplemental Guidance (151717Z Jan 97) (ALARACT 011/97).

### **B. Purpose. A soldier must be recycled or reassigned to a new unit at least once before separation action can be initiated under AR 635-200:**

1. Involuntary separation due to parenthood, para 5-8.
2. Personality disorder, para 5-13.
3. Entry level performance and conduct, chap 11.
4. Unsatisfactory performance, chap 13.
5. Minor disciplinary infractions or a pattern of misconduct, para 14-12a and 14-12b.

### **C. Procedure.**

1. Period required.

- a. Soldiers in replacement stream: recycle between training companies where feasible; if not, between training platoons.
  - b. Soldiers in regular units: reassign between battalion-size units at least once, with a minimum of two months in each unit, where possible. PCS possible only for SPC/CPL & below, w/ less than 2 years TIS, & no family members.
2. Very limited. The company-level commander requests the transfer, and the request is processed through command channels to the approval authority. No due process rights for the soldier.
  3. A soldier usually cannot be reassigned to a different installation on a rehabilitative transfer. *See* AR 635-200, para 1-18c(3).

D. Approval Authority.

1. Not specified in AR 635-200, para 1-18. Logically, first commander with authority over the gaining and losing unit.
2. May waive requirement for rehabilitative transfer.
  - a. Routine, common practice in many units. (“The exception that swallows the rule.”)
  - b. *Waiver now extremely limited in Chapter 11 and Chapter 13 cases.* *See* DA Messages cited above. **Represents significant change from common past practice for many units.**
  - c. Document why you are doing it. Make sure there is something in the file to *support* your *conclusion* that transfer would:
    - (1) “Create serious disciplinary problems or a hazard to the military mission or to the soldier, or



- (2) “Be inappropriate because the soldier is resisting rehabilitation attempts, or
- (3) “Rehabilitation would not be in the best interest of the Army as it would not produce a quality soldier.”

E. Appeal. No specific provisions.

F. Records. No specific provisions. In practice, losing unit should document reasons for rehabilitation with counseling with a view towards separation, and maintain those records for one year after soldier’s departure (*i.e.*, transfer to gaining unit if needed to support a separation action).

## **IX. ADMINISTRATIVE REPRIMAND, CENSURE, OR ADMONITION.**

A. References.

1. AR 600-37.
2. AR 25-400-2, The Modern Army Record keeping System (MARKS), para B-80 and Table B-91, 26 Feb 93 (regarding MARKS number 640a).

B. Purpose.

1. Documents misconduct or poor performance in official files.
2. Leadership tool.
3. Be wary of information originating *solely* from intelligence and personnel security files: this information requires special handling (*See*, e.g., AR 600-37, para 4-6; AR 380-67, Chapter 8).

C. The terms defined.

1. “Reprimand. To reprove severely; to censure formally, especially with authority. . . . A public and formal censure or severe reproof, administered to a person in fault by his superior officer or by a body or organization to which he belongs.” Black’s Law Dictionary 1170 (5th ed. 1979).
2. “Censure. . . . An official reprimand or condemnation.” *Id.* at 203.
3. “Admonish. To caution or advise. To counsel against wrong practices, or to warn against danger of an offense.” *Id.* at 45.
4. What’s the practical difference? Don’t use *censure*; it’s ambiguous. Use *reprimand* instead if you wish to reprove someone for something they have done. Use *admonish* if the person’s wrongdoing is not clear, but you wish to make a record of warning the person to avoid or desist from certain behavior. The procedures outlined in AR 600-37 apply to the filing of all three actions.

D. Procedure.

1. Drafting and initiating the letter.
  - a. For enlisted soldiers. Initiated by the person's immediate commander, any higher commander in the chain of command, a supervisor, school commandant, general officer, or GCMCA.
  - b. For officers. As above, less “supervisor,” plus any rating official.
2. Contents. (*See* Figure 3, *infra* at p. O-15.)
  - a. Reason for reprimand.

- b. The statement that the reprimand was imposed as an administrative measure and not as punishment under Article 15. AR 27-10, para 3-3.
  - c. If the reprimand is intended for filing in the OMPF, either the reprimand or the document referring the reprimand should indicate where the drafter desires to file the reprimand.
- 3. Notice and rebuttal by the soldier. AR 600-37, paras 3-2 and 3-6.
  - a. Notice (a copy of the reprimand & subsequent information):  
**Note:** Recent Gonzalez case and Army Times coverage.
  - b. Rebuttal (by endorsement).
  - c. No right to counsel, but local legal assistance and Trial Defense Services will often try to see soldiers, time permitting.

E. Appeal.

- 1. Local filing. No formal appeal process.\
- 2. OMPF filing. Appealed to DA Suitability Evaluation Board (DASEB). Normally, consideration of these appeals is restricted to SSG and above.
  - a. Grounds for removal: document is untrue or unjust.
  - b. Grounds for transfer from P-fiche to R-fiche: document is untrue or unjust; or reprimand has served its intended purpose. If basis is that reprimand has served its intended purpose, soldier must wait at least one year since imposition of the reprimand and have received at least one OER or NCOER.

**COMPANY A  
16TH SIGNAL BATTALION, 29TH SIGNAL GROUP  
FORT ARLINGTON, VIRGINIA 11111**

ABCD-EF-B

6 June 2001

MEMORANDUM FOR PV2 Kathleen B. Nash, Company A, 16th Signal Battalion, 29th Signal Group, Fort Arlington, Virginia 11111

SUBJECT: Written Reprimand UP AR 600-37

1. On 22, 24, 26, and 31 May 2001, you were absent without authority from your appointed place of duty. You failed to report to the unit supply room at Company A, 16th Signal Battalion, 29th Signal Group, at the appointed time, 0800, to begin your duties on those dates. Further you were formally counseled on a number of prior occasions and orally admonished for similar offenses. You are hereby reprimanded for your conduct on 22, 24, 26, and 31 May.
2. You are expected to be at your appointed place of duty at the appointed time unless excused by proper authority. Your persistent tardiness will not be tolerated in this unit.
3. This is an administrative reprimand imposed under the provisions of AR 600-37 and not as punishment under UCMJ, Article 15.
4. I intend to file this written reprimand in your unit personnel file. You have 72 hours from the receipt of this reprimand to submit matters in rebuttal or on your behalf. Your response should be by endorsement to this reprimand. I will withhold my decision on imposing and filing this reprimand until I receive and consider your response.

HARD CHARGER  
Captain, SC  
Commanding

***Figure 3***

- F. Records. Memorandum maintained in local unit files until 12 months after a soldier's departure, or permanently on the OMPF.

## **X. LOCALLY IMPOSED (OR "FIELD") BAR TO REENLISTMENT.**

- A. Reference. AR 601-280, Chapter 8 (29 Sep 95). [Note date of "stand-alone" edition; edition in Enlisted Ranks Personnel Update 16 is obsolete.]
- B. Purpose.
  - 1. Only soldiers of high moral character, personal competence, and demonstrated adaptability to the requirement of the professional soldier's moral code will be reenlisted in the Active Army. Soldiers who cannot, or do not, measure up to such standards . . . will be barred from further service . . . AR 601-280, para 8-2a.
  - 2. A potentially rehabilitative tool: puts pressure on soldier to shape up; sets up soldiers who fail to do so for separation.
  - 3. Discretionary grounds for bar to reenlistment. AR 601-280, para 8-4d, lists 28 reasons, including but not limited to tardiness, loss of clothing or equipment, substandard personal appearance or hygiene, indebtedness, nonjudicial punishment, traffic violations, inability to follow orders, apathy, cannot adapt to military life, failure to manage personal affairs, behavior which brings discredit upon the unit or Army, failure to pass APFT or weapons qualification, and noncompetitive for promotion.
  - 4. Mandatory grounds for bar to reenlistment. AR 601-280, para 8-4c.

- a. Single soldier and in-service couples with dependent family members when soldier has been counseled IAW AR 600-20, Chapter 5, and does not have an approved family member care plan on file w/in 2 months.
  - b. Single soldiers and in-service couples with dependent family members w/ instructions of overseas assignment, if unable to provide the name of a guardian who will care for their family members in CONUS in the event of evacuation from overseas.
  - c. Weight control failures.
- 5. Commander's option: bar from reenlistment, or proceed directly to separation action.
  - a. Soldiers who fail two consecutive APFTs (or commander may proceed with separation immediately).
  - b. Soldiers who are removed for cause from an NCOES course (or commander may proceed with separation immediately).
- C. Procedure. AR 601-280, para 8-5.
  - 1. Initiating the bar.
    - a. Any commander in soldier's chain of command may initiate.
    - b. Bars are usually not appropriate during a soldier's first 90 days or last 30 days in a unit. If circumstances warrant, soldier may be barred, but the certificate should explain the timing.
    - c. Use DA Form 4126-R.

2. Notice and rebuttal by the soldier.
  - a. If soldier requests, allow seven days for comment.
  - b. Rebuttal attached to DA Form, 4126-R.
  - c. No right to counsel. TDS or legal assistance will generally try to see soldier.
3. Initiating commander attaches soldier's rebuttal (if any) and forwards through chain of command to approval authority. Personal action by each commander or acting commander required. Any commander may disapprove.
4. Restrictions.
  - a. May not approve bar after soldier separates from active duty.
  - b. May not enter bar in soldier's records after soldier separates from active duty.
  - c. May not retain soldier involuntarily past ETS in order to approve bar.
5. Company level commander informs/"counsels" soldier if bar approved using back side of DA Form 4126-R, Bar Certificate.
6. Periodic review by the unit commander.
  - a. At least once every 3 months after date of approval, and 30 days before the soldier's PCS or ETS.

- b. [After first review, must advise soldier of option of voluntary separation under AR 635-200, para 16-5. *This provision has been suspended indefinitely by DA.*]
    - c. Must lift bar or initiate separation (AR 635-200, Chapter 13, for underlying grounds) after second review.
  - 7. [Option of requesting voluntary separation. AR 635-200, para 16-5, and AR 601-280, para 8-5f. *This provision of the regulation has been suspended indefinitely by DA.*]
    - a. [Approval is at discretion of first LTC-level commander.]
    - b. [A soldier separated under these provisions will receive an honorable discharge, but no separation pay.]
- D. Approval Authority. Depends upon soldier's active Federal service (AFS) on date of bar initiation. (Note change from previous practice, when AFS at ETS controlled.)
  - 1. Less than ten years AFS on date bar was initiated: LTC commander or SPCMCA.
  - 2. Ten years or more AFS on date bar was initiated: general officer in command or GCMCA .
  - 3. Commander who initiates bar cannot approve bar.
  - 4. If bar initiated above company level, approval authority must be GCMCA, GO in command, or HQDA.
- E. Appeal.
  - 1. Soldier has seven days to submit appeal.



2. If otherwise qualified, soldier will not be involuntarily separated while appeal is pending.
  3. Appellate authority. Depends upon soldier's AFS on date of bar initiation and approval authority.
    - a. Less than 10 years AFS on date bar was initiated: general officer in command or GCMCA .
    - b. 10 years or more AFS on date bar was initiated, or bar approved by GCMCA/GO in command: HQDA.
    - c. Bar approved by PERSCOM: no appeal.
- F. Records. DA Form 4126-R (still) filed permanently in MPRJ. Approved bar annotated on soldier's DA Form 2-1.

## **XI. THE QUALITATIVE MANAGEMENT PROGRAM (OR "QMP") BAR TO REENLISTMENT.**

- A. **New Authority: AR 635-200, Ch. 19.** Old Authority: AR 601-280, Chapter 10. (Proponency and guidance for QMP has moved to AR 635-200.)
- B. Purpose. Eliminate unproductive and nonprogressive soldiers. Not intended to be rehabilitative; in reality a fast track to separation.
- C. Procedure.
  1. Files of all soldiers Staff Sergeant (E-6) or higher in grade (with at least 8 years TIS) reviewed annually by DA promotion boards. Boards select soldiers for QMP.

2. Notification packet mailed from DA to installation or overseas command, who forwards packet to first LTC (or higher) commander in soldier's chain of command. Commander must serve packet on soldier within two days. Packet contains:
    - a. Instruction letter to commander;
    - b. Instruction letter to soldier;
    - c. Document(s) which triggered bar; and
    - d. Soldier's statement of option.
  3. Soldier has seven days from date of receipt to elect one of five options:
    - a. Appeal;
    - b. Do nothing and face separation;
    - c. Request immediate discharge under AR 635-200, para 16-5, and forfeit any chance to receive separation pay;
    - d. Retire, if retirement eligible; or,
    - e. Extend to retirement eligibility, if memorandum date is between 17 years, 9 months AFS and 20 years AFS.
- D. Approval Authority. DA. Action has already been approved when it is received in the field. Soldier's action is just a statement of option, and perhaps an appeal.
- E. Appeal.

1. Grounds.
  - a. Material error in file. “An error is considered reasonable when there is a reasonable chance that had the error not existed, the soldier might not have been selected for the QMP.”
  - b. Improved duty performance.
2. Must be submitted to chain of command w/in 45 days of date of memorandum.
3. Must arrive at USAEREC w/in *60 days* of date received by soldier, or appeal decision will automatically be converted to Option 2 (do nothing; get separated).
4. Considerations on appeal. Appeals, particularly those submitted on the basis of improved duty performance, without strong, personal chain of command support are rarely successful. [Remember, the board which selected the soldier for DA QMP bar had the soldier’s subsequent NCOERs and AERs before them.]

F. Records. Maintained by DA as part of OMPF.

## **XII. THE ARMY WEIGHT CONTROL PROGRAM.**

A. References.

1. AR 600-9, The Army Weight Control Program, 1 Sep 86 (as published in All Ranks Personnel Update 15, 1 Oct 90). I01, 4 Mar 94 (exp 4 Mar 96). New version of AR 600-9 still pending.

2. National Academy of Sciences Institute of Medicine, Body Composition and Physical Performance: Applications for the Military Services (Bernadette M. Marriott and Judith Grumstrup-Scott eds., 1992) (study commissioned by the US Army Medical Research and Development Command which criticizes the Army's weight control program).

B. Purpose. To ensure that all soldiers:

1. Are able to meet the physical demands of their duties under combat conditions; and
2. Present a trim military appearance at all times.

C. Procedure.

1. Commanders and supervisors will monitor soldiers to ensure that they maintain proper weight. At minimum, soldiers will be weighed when they take the APFT or at least every 6 months. Commander may direct weight check if soldier presents an unmilitary appearance.
2. All soldiers scheduled to attend professional military schooling will be screened before departure. If the soldier exceeds the screening table weight, he will not be allowed to depart unless his commander determines that he meets body fat composition standards. Soldiers arriving overweight at any DA select school or those who PCS to a professional military school will be processed for disenrollment.
3. Soldiers exceeding the screening table weight will be tested for body fat using the "tape" test.
4. Commanders will flag overweight personnel IAW AR 600-8-2. Flagged personnel are:
  - a. Are nonpromotable;

- b. Will not be assigned to command positions;
- c. Will not be authorized to attend professional military schooling; and
- d. Will not be allowed to reenlistment or extend unless:
  - (1) The GCMCA approves an extension of a soldier who either has a temporary medical condition that precludes weight loss or is pregnant and otherwise qualified for reenlistment; or,
  - (2) The GCMCA approves an extension of a soldier who has completed a minimum of 18 years active federal service. [Application for retirement will be submitted at the time the extension is approved.]

5. Flagged personnel will be enrolled in the Army Weight Control Program (AWCP).

- a. The loss of 3-8 pounds per month is deemed to be satisfactory progress in the AWCP. Overweight soldiers who fail to make satisfactory progress within 6 months will either be processed for a bar to reenlistment or will have separation proceedings initiated against them. Commander must notify the soldier in writing that separation is being considered and consider the soldier's response. If the soldier's response is not satisfactory, initiate separation UP AR 635-200, Chapter 18. Results in an honorable discharge.
- b. Overweight soldiers who are reenrolled in the AWCP within 12 months of successfully complete an enrollment in the AWCP will be processed for separation.

- c. Overweight soldiers who are reenrolled in the AWCP after more than 12 months but less than 36 months of successfully complete an enrollment in the AWCP will be given 90 days to achieve standards. Soldiers who fail to achieve standards will be processed for separation.

D. Approval Authority.

- 1. Authority to place a soldier in the weight control program: company-level commander.
- 2. Separation authority for active-component enlisted soldiers.
  - a. LTC-level commander if soldier has less than six years active and reserve service (notification procedure used).
  - b. SPCMCA if soldier has six or more years service (administrative board procedure used).

E. Appeal. No specific procedure.

F. Records.

- 1. Upon removal from weight control program, records will be maintained in unit (Bn S1/PAC) files for 36 months or until the soldier's PCS.
- 2. Upon transfer from one unit to another, the losing commander will forward a memorandum to the gaining commander indicating the status of the soldier's participation in a weight control program, and forward any records.
- 3. When soldier successfully completes AWCP, completion date will be entered in SIDPERS and the soldier's name and completion date will continue to print out on the unit's C95 (FLAG) roster for 36 months.

### **XIII. DRUNK OR DRUGGED DRIVING - ADMINISTRATIVE SANCTIONS.**

#### **A. References.**

1. AR 190-5.
2. AR 600-85.

#### **B. Purpose.** Drunk driving (including drugged driving) administrative sanctions operate in concert with the Army Substance Abuse Program (ASAP) to prevent alcohol and drug abuse, identify abusers, rehabilitate those abusers who warrant retention, and separate those who do not.

#### **C. Procedures.**

1. Withdrawal of driving privileges. AR 190-5, para 2-5.
  - a. **Suspension** is immediate pending resolution of drunk driving charges brought in the following circumstances:
    - (1) Refusal to take or complete a lawfully requested chemical test to determine contents of blood for alcohol or other drugs;
    - (2) Operating a motor vehicle with a blood alcohol content (BAC) of 0.10% by volume or higher or in violation of the law of the jurisdiction that is being assimilated on the installation;

- (3) Operating a motor vehicle with a BAC of at least 0.05% by volume but less than 0.10% blood alcohol by volume in violation of the law of the jurisdiction in which the vehicle is being operated, if the jurisdiction imposes a suspension solely on the basis of the BAC; or,
- (4) On an arrest report or other official documentation of the circumstances of an apprehension for intoxicated driving.

b. **Limited hearing.** AR 190-5, para 2-6. Following the suspension of driving privileges, the subject has ten days in which to request a hearing. If requested, the hearing must be conducted by the installation commander or designated hearing officer within ten days. The hearing officer must issue a decision within ten duty days of the hearing. Issues addressed:

- (1) Did the law enforcement official have reasonable grounds to believe person was DWI or in actual physical control of motor vehicle while under the influence of alcohol or other drugs?
- (2) Was the apprehension or citation lawful?
- (3) Was the person lawfully requested to submit to a test for alcohol or other drug content of blood, breath, or urine and was he informed of the consequences of refusal to take or fail to complete such test?
- (4) Did the person refuse to submit to the test for alcohol or other drug content of blood, breath, or urine? Did the person fail to complete the test? Do the results of a completed test indicate a BAC of .10% or higher the presence of other drugs?



- (5) Was the testing method used valid and reliable? Were the results accurately evaluated?
  - c. **Revocation** for period of one year. AR 190-5, para 2-5.
    - (1) Lawfully apprehended for DWI and refused to submit to or to complete a test to measure the alcohol content in the blood, or detect the presence of any other drug.
    - (2) Conviction, NJP, or military or civilian administrative action resulted in suspension or revocation of a driver's license for DWI.
    - (3) Compute from date of original suspension, exclusive of periods when full driving privileges restored pending resolution of charges.
  - d. **Restricted privileges.** AR 190-5, para 2-11. Specifically tailored to permit the subject to drive under restricted conditions (e.g., for medical emergencies; to and from work site; duty driving).
    - (1) May be requested at any time.
    - (2) GCMCA acts on all DWI/DUI requests for restricted privileges.
- 2. Referral to ASAP. AR 190-5, para 2-9.
  - a. Mandatory (within 10 days).
  - b. Enrollment is discretionary.
- 3. General Officer Memorandum of Reprimand (GOMOR). (*See Figure 5, infra* p. O-29).

**Department of the Army  
52d Infantry Division (Mechanized) and Fort Arlington  
Fort Arlington, Virginia 11111-1111**

ABCD-EF-G

15 June 2001

MEMORANDUM FOR 1LT Gideon Pillow, Company A, 2d Battalion, 11th Infantry, Fort  
Arlington, Virginia 11111

SUBJECT: Written Reprimand UP AR 600-37

1. On 1 June 2001 you were apprehended at approximately 2200 while driving your privately owned vehicle on Fort Arlington. The arresting officer cited you for driving under the influence of intoxicating liquor. Subsequently, on 3 June 2001, you were convicted of that offense after a trial on the merits in the Federal Magistrate's Court on Fort Arlington. I hereby reprimand you for your conduct.
2. Your conduct on 1 June 2001 demonstrates a serious disregard for your own safety and that of others. It raises grave doubts as to whether you can perform your duties. Your lack of judgment in this incident calls into question whether you deserve the special trust and confidence that the President of the United States has reposed in you as a commissioned officer. I charge you to conduct yourself in a manner that is worthy of an officer in the United States Army.
3. This is an administrative reprimand imposed under the provisions of AR 600-37 and not as punishment under UCMJ, Article 15.
4. I intend to file this written reprimand in your Official Military Personnel File. You have 72 hours from the receipt of this reprimand to submit matters in rebuttal or on your behalf. Your response, if any, should be by endorsement to this reprimand. I will withhold my decision on imposing and filing this reprimand until I receive and consider any response you may make.

RICHARD J. HALFTRACK  
Major General, USA  
Commanding



*Figure 5*

- a. Mandatory. Must be issued to active duty Army commissioned and warrant officers and NCOs, including corporals.
- b. General Officer will sign.
- c. Based upon:
  - (1) Conviction of intoxicated driving or driving under the influence of alcohol or other drugs, on or off the installation;
  - (2) Refusal to take or failure to complete a lawfully requested test to measure alcohol or drug content of the blood, breath, or urine, on or off the installation, when there is reasonable belief of driving under the influence of alcohol or drugs;
  - (3) Driving or being in physical control of a motor vehicle on post when the blood alcohol content is 0.10% or higher, irrespective of other charges, or off post when the blood alcohol content is in violation of state laws, irrespective of other charges; or,
  - (4) Driving or being in physical control of a motor vehicle, either on or off the installation, when lawfully requested chemical tests reflect the presence of illegal drugs.
- d. Filing is IAW AR 600-37. The General Officer may:

- (1) Decide to not file the GOMOR;
  - (2) Decide to file the GOMOR in the soldier's Unit Personnel File.
  - (3) Decide to file the GOMOR in the soldier's OMPF.
4. Consider other administrative actions. AR 190-5, para 2-7c.
  - a. Administrative reduction UP AR 600-200.
  - b. Bar to reenlistment UP AR 601-280.
  - c. Administrative discharge per AR 635-200. AR 600-85, para 1-11c, directs the command to consider separation in DWI cases.

#### **XIV. REMOVAL FROM PROMOTION LIST.**

- A. Reference. AR 600-8-19, para 3-28 (Local Promotion List) and para 4-18 (Centralized Promotion List).
- B. Purpose. To take administrative action against those soldiers who have been selected for promotion, but whose conduct or duty performance no longer merits promotion. Recall that soldiers may be selected for promotion some months before they are actually promoted. Such soldiers are said to be "on the list." (The informal practice has evolved of writing such "promotable" soldiers' ranks with "(P)" after the rank designation, such as "SGT(P) Chen" or "LTC(P) Vasquez.") [For the Army policy on use of "(P)" designation, *see* AR 25-50, para 7-5c(2).]
- C. Procedure.

1. Soldiers otherwise eligible for promotion to PV2 (E-2), PFC (E-3), and SPC/CPL (E-4). (Unit commander promotes without referral to promotion board.) Unit commander may decide not to promote.
2. Soldiers selected for promotion to SGT (E-5) and SSG (E-6). (Local board considers soldiers for promotion to SGT and SSG. Field grade commander of unit authorized LTC commander approves the list.)
  - a. The command will provide soldiers with a written explanation for the proposed removal. However, under certain circumstances, including those listed in AR 600-8-19, para 3-28b, immediate removal from the promotion list is required. Though not all inclusive, no further due process is required in the following circumstances:
    - (1) Failure to Qualify for MOS-required Security Clearance;
    - (2) Local Bar to Reenlistment (if appeals exhausted);
    - (3) Reduction in Grade;
    - (4) Weight Control Failure;
    - (5) Release from Active Duty; and,
    - (6) Dropped From Rolls.
  - b. A removal board will be convened if immediate removal is not justified under AR 600-8-19, para 3-28b.
    - (1) AR 15-6 procedures do not apply.
    - (2) Recorder will give at least 15 days written notice to soldier.

- (3) Soldier may be present and recorder will arrange for the presence of requested witnesses, if reasonably available.
- (4) Recorder will provide statements of witnesses who cannot attend the board.
- (5) Soldier may:
  - (a) Appear personally or decline to appear;
  - (b) Challenge members for cause;
  - (c) Question witnesses; and,
  - (d) Remain silent, make a sworn or unsworn statement, and/or submit to examination by the board.
- (6) The board will:
  - (a) Fully and impartially evaluate the case;
  - (b) Make a recommendation; and
  - (c) Prepare a written report for submission to the approval authority.
- (7) The promotion authority will approve or disapprove the board's recommendation and notify the soldier of his decision.

3. Soldiers selected for promotion to SFC (E-7), MSG/1SG (E-8), and SGM/CSM (E-9). (Soldiers selected for promotion by DA-level board.)
  - a. Commanders may recommend removal from a DA list. Removal may be based on substandard duty performance or misconduct. "Removal based on minor or isolated incident(s) of conduct may be unfair to the soldier." (IO1, Apr 94)
  - b. The commander must submit a recommendation for removal if the soldier is nonpromotable due to being overweight and:
    - (1) Soldier fails to make satisfactory progress after six months; or
    - (2) After 12 months in a weight control program the soldier still exceeds body fat standards.
  - c. Removal without referral to the soldier (AR 600-8-17, para 4-18a(1)). Commanders will notify Cdr, PERSCOM, by message for immediate removal of any soldier who has been:
    - (1) Reduced;
    - (2) Discharged;
    - (3) Dropped from the rolls;
    - (4) Approved for retirement (IO1, Apr 94);
    - (5) Barred from reenlistment due to signing a declination of continued service statement, AWOL, local bar, or court-martial during current enlistment (IO1, Apr 94);

(6) Or who otherwise falls within the factual situations listed in AR 600-8-19, para 4-18(a)(1).

d. Other cases. If the reason for removal is not listed in AR 600-8-19, para 4-18a(1), the recommendation for removal must be referred to the soldier and the soldier must be given 15 days to submit matters in rebuttal. A soldier who declines to submit rebuttal must do so in writing.

(1) Upon initiation, the commander must impose a flag.

(2) Forward recommendation and soldier's rebuttal through GCMCA. May be disapproved at any level.

(3) DA makes final decision.

D. Approval Authority.

1. Soldiers otherwise eligible for promotion to PV2 (E-2), PFC (E-3), and SPC/CPL (E-4): unit commander.
2. Soldiers selected for promotion to SGT (E-5) and SSG (E-6): field grade commander of unit authorized LTC commander.
3. Soldiers selected for promotion to SFC (E-7), MSG/1SG (E-8), and SGM/CSM (E-9): DA.

E. Appeal. No specific procedure.

F. Records.

1. Soldiers otherwise eligible for promotion to PV2 (E-2), PFC (E-3), and SPC/CPL (E-4). No records required. If reasons warrant, consider documenting with a counseling with a view towards separation.



2. Soldiers selected for promotion to SGT (E-5) and SSG (E-6). DA Form 4187, Removal Board Report, and DA Form 3355 filed in battalion functional files for two years.
3. Soldiers selected for promotion to SFC (E-7), MSG/1SG (E-8), and SGM/CSM (E-9). Maintained at DA.

## **XV. ADMINISTRATIVE REDUCTION FOR CIVIL CONVICTION OR INEFFICIENCY.**

A. Reference. AR 600-8-19, Chapter 6.

B. Purpose.

1. Civil conviction. A soldier convicted by a civil court (domestic or foreign) or adjudged a juvenile offender by a civil court (domestic or foreign) will be reduced or considered for reduction. AR 600-8-19, para 6-3a.
2. Inefficiency. Inefficiency is a demonstration of characteristics that shows that the person cannot perform duties and responsibilities of the grade and MOS. Inefficiency may also include an act or conduct that clearly shows that the soldier lacks those abilities and qualities normally required and expected of an individual of that grade and experience. Commanders may consider misconduct, including conviction by a civil court, as bearing on efficiency. A soldier may be reduced under this authority for long-standing unpaid personal debts that he or she has not made a reasonable effort to pay. AR 600-8-19, para 6-5.

C. Authority to Reduce.

1. PV2, PFC, and SPC/CPL - Company, troop, battery, and separate detachment commanders.

2. SGT and SSG - Field grade commander of any organization authorized a LTC or higher grade commander.
3. SFC, MSG/1SG, and SGM/CSM - Commanders of organizations authorized a COL or higher grade commander.

D. Procedure.

1. Civil Court Conviction (domestic or foreign, or adjudication as a juvenile offender). AR 600-8-19, Table 6-1. (*See Chart, infra* at pp. O-41 through O-43).
  - a. Soldier will be reduced to PVT, E-1, if sentence includes death or confinement for one year or more (not suspended). Board action not required.
  - b. The command will consider reducing the soldier (one or more grades) if sentenced to confinement for more than 30 days but less than one year (not suspended) or confinement for one year or more (suspended). Board action required for SGT or above.
  - c. The command may consider reduction for all other offenses. Board action required for SGT or above.
2. Inefficiency. AR 600-8-19, para 6-4.
  - a. Soldier cannot perform duties and responsibilities of the grade and MOS. Inefficiency includes long standing unpaid debts that the soldier has not made a reasonable effort to pay.
  - b. Command must document inefficiency. Should establish a pattern of inefficiency rather than identify a specific incident. A single act of misconduct is not a sufficient basis for reduction for inefficiency.

- c. Soldier must have been in unit at least 90 days.
  - d. Command may reduce soldier only one grade.
- 3. Soldier gets notice and opportunity to respond.
  - a. SPC/CPL and below - no board.
  - b. SGT and above - reduction board is usually required (exceptions noted above). Board appearance may be declined in writing, which will be considered acceptance of the reduction board's action.
- 4. Reduction Boards. AR 600-8-19, para 6-6.
  - a. Must have both officers and enlisted members.
  - b. At least three voting members.
  - c. Members impartial.
  - d. Recorder without vote appointed.
  - e. Board has officer or enlisted soldier or both of same sex as soldier being considered for reduction.
  - f. For inefficiency cases only, one board member will be familiar with soldier's MOS or field of specialization.
  - g. If soldier is minority and requests minority member on board, generally must provide minority member.

E. Appeal.

1. SSG and below - next higher authority.
2. SFC and above - next higher authority who is a general officer.

F. Records. Filed in OMPF.

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### ARMY ADVERSE ADMINISTRATIVE ACTIONS

	<b>SUSPENSION OF FAVORABLE PERSONNEL ACTION</b>	<b>EXTRA TRAINING</b>	<b>REVOCATION OF PASS PRIVILEGES</b>	<b>COUNSELING WITH A VIEW TOWARDS SEPARATION</b>	<b>REHABILITATIVE TRANSFER</b>
<b>Grounds for Action</b>	Other adverse action contemplated or investigation pending	Soldier deficient in any aspect of duty or conduct	Soldier deficient in any aspect of duty or conduct	Cdr contemplates separation for parenthood (5-8), personality disorder (5-13), entry level perf (ch 11), unsat perf (ch 13), or misconduct (ch 14)	
<b>Ultimate Result</b>	Many favorable personnel actions barred temporarily	Soldier corrects the problem	Soldier not permitted to leave post or place of duty during normal off-duty hours	Soldier on notice that continued poor performance may lead to separation, and consequences	Soldier gets a fresh start in a new unit
<b>Regulation</b>	AR 600-8-2 (30 Oct 87)	AR 600-20, para 4-6b (30 Mar 88)	AR 600-8-10, para 5-28 (1 Jul 94)	AR 635-200, para 1-18 (17 Sep 90)	
<b>Who Initiates</b>	Commander or GO staff head	Any leader	Any leader	“Any responsible person”	Commander
<b>Board hearing</b>	No	No	No	No	No
<b>Entitled to Counsel</b>	No (but see AR 27-3, para 3-6g(4)(i))	No	No	No	No
<b>SJA Review</b>	No	No	No	No	No
<b>Approval Authority</b>	Cdr or GO staff head	“[I]nherent power of command.”	Unit Commander	None	Commander w/ auth over losing and gaining unit
<b>Appeal Authority</b>	No formal appeal	No formal appeal	No formal appeal	No formal appeal	No formal appeal

### ARMY ADVERSE ADMINISTRATIVE ACTIONS

	ADMINISTRATIVE REPRIMAND	LOCAL (OR FIELD) BAR TO REENLISTMENT	DA OR QMP BAR TO REENLISTMENT	DRUNK DRIVING SANCTIONS
<b>Grounds for Action</b>	Misconduct or unsatisfactory performance	Untrainable, unsuitable, PT failure, NCOES RFC, weight control failure; [no family care plan or no guardian, if applic.]	Moral or ethical problems; declining performance; no potential for continued service	Refusal to test; BAC > .10% (or between .05% and .10% depending on local law); or any official report of DWI
<b>Ultimate Result</b>	Written reprimand may be filed in soldier's permanent records	Soldier can't reenlist, and may face separation action in six months	Soldier will be separated in 90 days, unless appeal successful	Privilege to drive on post or in overseas command suspended or revoked
<b>Regulation</b>	AR 600-37, chap 3 (19 Dec 86)	AR 601-280, chap 8 (29 Sep 95)	AR 635-200, ch. 19 (1 Jan. 01)	AR 190-5, chap 2
<b>Who Initiates</b>	Cdr, supervisor (enl) or rater (off), school cmdt, GO or GCMCA	Any commander	SSG & +: all records reviewed automatically by HQDA promo. boards	Installation commander or designee not assigned to law enf duties
<b>Board hearing</b>	No	No	Record review; see above	W/in 10 days, on request
<b>Entitled to Counsel</b>	No (but see AR 27-3, para 3-6g(4)(j))	No (but see AR 27-3, para 3-6g(4)(f))	No (but see AR 27-3, para 3-6g(4)(f))	No (but see AR 27-3, para 3-6g(4)(w))
<b>SJA Review</b>	No	No	No	No
<b>Approval Authority</b>	OMPF: GO or GCMCA	<10 yrs svc: LTC cdr; 10-18, >20: GO or GCMCA; 18-20: DA	HQDA promotion selection board	Installation commander
<b>Appeal Authority</b>	OMPF: DASEB	<10 yrs svc: GO or GCMCA; all others: DA	Commander, US Army Enlisted Records Center	GCMCA may grant restricted privileges

### ARMY ADVERSE ADMINISTRATIVE ACTIONS

	REMOVAL FROM SGT OR SSG PROMOTION LIST	REMOVAL FROM SFC, MSG, OR SGM PROM LIST	REMOVAL FROM OFFICER PROMOTION LIST	REDUCTION FOR INEFFICIENCY (ENLISTED)	REDUCTION FOR CIVIL CONVICTION (ENLISTED)
<b>Grounds for Action</b>	Poor duty perf, Art. 15 punishment; pending OTH discharge; 16 other grounds	Substandard duty performance; 10 other grounds	Referred OER or AER, Art. 15, OMPF reprimand; AWCP failure; derogatory info	Unable to perform duties & responsibilities required of rank and MOS	Any civilian conviction. Mandatory if confined for 1 yr or more (unsuspended)
<b>Ultimate Result</b>	Soldier is removed from promotion standing list			Soldier is reduced one rank	Soldier is reduced one or more ranks
<b>Regulation</b>	AR 600-8-19, chap 3 (1 Nov 91)	AR 600-8-19, chap 4 (1 Nov 91)	10 U.S.C. § 629(a); AR 600-8-29 (30 Nov 94)	AR 600-8-19, chap 6 (1 Nov 91)	
<b>Who Initiates</b>	Any commander	Any commander	Any commander	Any commander	Any commander
<b>Board hearing</b>	Yes (not full AR 15-6 board)	No	DA Promotion Review Board considers paper case	Yes, if soldier is SGT or above, unless reduction is for unsuspended sentence of confinement for one year or more	
<b>Entitled to Counsel</b>	No	No	No	Yes (provided by Trial Defense Service)	
<b>SJA Review</b>	No	No	No	No	No
<b>Approval Authority</b>	LTC-level commander	DA Standby Advisory Board	The Secretary of the Army	PV2-CPL: company level commander SGT-SSG: field grade commander SFC-CSM: COL or higher commander	
<b>Appeal Authority</b>	No formal appeal	No formal appeal	No formal appeal	Next higher cdr for SSG & below First GO for SFC & above	



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**UNITED STATES ARMY  
THE CHIEF OF STAFF**

06 December 1996

To the Chain of Command:

As the leaders of America's Army, we share a responsibility to recruit, train, and retain the best soldiers in the world. We attract young people from all walks of life and mold them into outstanding soldiers. Our Army is a modern success story--yet, we have our challenges.

The attrition rate of first-term soldiers from active duty is unacceptably high. We lose 15 of every 100 soldiers by 6 months of service and 37 of every 100 before their first ETS. This attrition rate is well above our experience of the late 1980s. However, we have recruited the highest quality in our Army's history. If the 90,000 soldiers entering the Army this year attrite at the current rates, 33,000 will depart before their normal ETS. High attrition causes unit readiness to suffer and consumes dollars that can be better spent on other vital programs. I need your help.

I am not asking you to retain bad soldiers -- far from it; we must do nothing to de-emphasize the importance of quality. It is fundamental to current and future success. Army leaders at all levels must encourage good soldiers to stay in the Army, and to rehabilitate those who may falter but who have the potential to serve honorably and well. While the screening process will never be flawless, almost every soldier we enlist has the moral, physical, and mental prerequisites for service. Our challenge is to motivate, train, and lead them -- to turn them into soldiers.

I fully realize that all leaders want their soldiers to be successful. However, I ask that you reexamine your procedures to ensure we are doing everything possible to help conserve our most precious resource -- our credentials -- our quality soldiers.

*Dennis J. Reimer*

Dennis J. Reimer  
General, United States Army  
Chief of Staff

**DEPARTMENT OF THE ARMY  
OFFICE OF THE DEPUTY CHIEF OF STAFF FOR PERSONNEL  
WASHINGTON, DC 20310-0300**

12 DEC 1996

MEMORANDUM FOR ALL MACOM DCSPERs

SUBJECT: First Term Attrition Reduction Goals

1. The CSA memorandum to all Army leaders dated 6 December 1996 emphasizes the need to reduce attrition while maintaining a quality force. Current attrition rates average 15 percent in the training base and an additional 22 percent after training before the end of three years for each annual accession cohort. These rates present our Army with some difficult challenges. The costs and recruiting efforts are tough to manage. I ask for your support as we work together to reduce attrition.

2. During the drawdown years a number of policy changes were implemented in the interest of minimizing the need for involuntary loss programs. As the enlisted force has reached its steady state Manning level, it is time to review policies designed to facilitate the drawdown with a view toward revisions that support sustainment of our current force levels. Our FY97 recruiting mission is 89,700 and the mission will remain in the mid-eighty thousand range; therefore, we must now focus on replacing each loss or reduce attrition.

3. The areas which contribute the greatest number of losses are voluntary separations under a local bar to reenlistment, separation for unsatisfactory performance, and weight control standards. Recent policy changes to some separation procedures have been distributed to the field. I ask that you ensure widest dissemination of these policy changes to ensure their early, favorable impact on attrition.

4. Finally, these policy changes represent a change in focus, but no reduction in standards. The changes in policy are designed to provide the latitude for leaders to make a difference and motivate soldiers to succeed. I know that you will use these policy changes to maintain our quality force while addressing the issue of enlisted attrition.

*F.E. Vollrath*

F.E. VOLLRATH  
Lieutenant General, GS  
Deputy Chief of Staff  
for Personnel

ROUTINE  
R 121752Z DEC 96  
FM DA WASHINGTON DC//DAPE-MPE//  
TO ALARACT

UNCLAS ALARACT 119/96

SUBJECT: ATTRITION OF FIRST TERM ENLISTED SOLDIERS

A. CSA MEMORANDUM TO CHAIN OF COMMAND, 6 DEC 96

B. AR 601-280, ARMY RETENTION PROGRAM

C. AR 635-200, ENLISTED SEPARATIONS

1. THIS MESSAGE REINFORCES CSA GUIDANCE IN REFERENCE A BY ANNOUNCING EXCEPTIONS TO PUBLISHED ENLISTED RETENTION/SEPARATION POLICY DESIGNED TO ASSIST IN REDUCING ATTRITION OF SOLDIERS SERVING THEIR INITIAL ENLISTMENT.

2. FOLLOWING EXCEPTIONS TO POLICIES PUBLISHED IN REFERENCES B AND C ARE ANNOUNCED:

A. INVOLUNTARY SEPARATION UNDER AR 635-200 FOR ENTRY LEVEL PERFORMANCE AND CONDUCT (CHAPTER 11) AND UNSATISFACTORY PERFORMANCE (CHAPTER 13). AUTHORITY TO APPROVE SEPARATION (PARAGRAPH 1-21) IS WITHDRAWN FROM COMMANDERS OF UNITS AUTHORIZED THE RANK OF LIEUTENANT COLONEL AS COMMANDER IS ELEVATED TO THE SPECIAL COURT-MARTIAL CONVENING AUTHORITY (SPCMCA). THE SPCMCA WILL ACT AS SEPARATION AUTHORITY FOR ALL CHAPTER 11 AND 13 PROCEEDINGS, UNLESS SUCH AUTHORITY IS WITHHELD BY A HIGHER SEPARATION AUTHORITY. IN ADDITION, THE PROVISION FOR WAIVER OF THE REHABILITATIVE TRANSFER REQUIREMENT (PARAGRAPH 1-18D) NO LONGER APPLIES TO CHAPTER 11 AND 13 CASES. THE INTENT OF THESE EXCEPTIONS TO POLICY IS TO STRESS THE NEED FOR COMMANDERS TO MAKE MAXIMUM USE OF COUNSELING, RETRAINING, AND REHABILITATION--AS DELINEATED IN PARAGRAPHS 1-1C(3), 1-17, AND 1-18 OF AR 635-200--BEFORE DETERMINING THAT A SOLDIER SHOULD BE SEPARATED.

B. VOLUNTARY SEPARATION OF SOLDIERS DENIED REENLISTMENT (PARAGRAPH 8-5I(6), AR 601-280, AND PARAGRAPH 16-5B, AR 635-200). FIRST-TERM SOLDIERS AGAINST WHOM A FIELD COMMANDER'S BAR TO REENLISTMENT HAS BEEN IMPOSED ARE NOT ELIGIBLE FOR VOLUNTARY EARLY SEPARATION ON GROUNDS OF INABILITY TO OVERCOME THE BAR. THE VOLUNTARY SEPARATION PROVISION IS LIMITED TO LOCALLY BARRED SOLDIERS SERVING ON A SECOND OR SUBSEQUENT ENLISTMENT. THE PURPOSE OF THIS EXCEPTION TO POLICY IS TO EMPHASIZE THAT LOCAL BAR TO REENLISTMENT IS INTENDED AS A PROBATIONARY DEVICE AND REHABILITATIVE TOOL, RATHER THAN A QUICK MEANS OF EARLY SEPARATION.

3. THE FOREGOING EXCEPTIONS TO POLICY ARE EFFECTIVE FOR SEPARATION ACTIONS INITIATED UNDER CHAPTER 11, CHAPTER 13, AND PARAGRAPH 16-5B, AR 635-200, AFTER RECEIPT OF THIS MESSAGE. SEPARATION ACTIONS INITIATED PRIOR TO RECEIPT OF THIS MESSAGE MAY BE PROCESSED TO COMPLETION UNDER THE PUBLISHED POLICIES, WITHOUT REGARD FOR THE EXCEPTIONS.

4. EXPIRATION DATE OF THIS MESSAGE CANNOT BE DETERMINED. BT



ROUTINE  
R 151717Z JAN 97  
FM DA WASHINGTON DC//DAPE-MPE//  
TO ALARACT

UNCLAS ALARACT 011/97

SUBJECT: ATTRITION OF FIRST-TERM ENLISTED SOLDIERS - -  
SUPPLEMENTAL GUIDANCE

A. ALARACT MESSAGE 119/96, HQDA (DAPE-MPE), 121752Z DEC 96,  
SUBJECT: ATTRITION OF FIRST-TERM ENLISTED SOLDIERS

B. AR 635-200

1. THIS MESSAGE PROVIDES FURTHER GUIDANCE TO SUPPLEMENT EXCEPTIONS TO PUBLISHED RETENTION/SEPARATION POLICIES ANNOUNCED BY REFERENCE A. THE INTENT CONTINUES TO BE REINFORCEMENT OF CSA'S 6 DECEMBER 1996 MEMORANDUM TO THE CHAIN OF COMMAND ON REDUCING ATTRITION OF SOLDIERS SERVING THEIR INITIAL ENLISTMENTS.
2. THE PREVIOUS EXCEPTION TO POLICY WHICH ELEVATED SEPARATION AUTHORITY FROM COMMANDERS OF UNITS AUTHORIZED THE RANK OF LIEUTENANT COLONEL (LTC) TO THE SPECIAL COURT-MARTIAL CONVENING AUTHORITY (SPCMCA) IS RESCINDED. LTC COMMANDERS MAY CONTINUE TO ACT AS SEPARATION AUTHORITY IN PROCEEDINGS CONDUCTED UNDER AR 635-200, CHAPTER 11 (ENTRY LEVEL PERFORMANCE AND CONDUCT) AND CHAPTER 13 (UNSATISFACTORY PERFORMANCE), UNLESS SUCH AUTHORITY IS WITHHELD BY THE SPCMCA OR HIGHER COMMANDER.
3. RESCISSION OF THE PROVISION FOR WAIVER OF REHABILITATIVE TRANSFER REMAINS IN FORCE FOR MOST CHAPTER 11 AND 13 CASES, BUT MUST BE TEMPERED BY COMMON SENSE AND SOUND JUDGMENT. THE INTENT IS TO GIVE A FRESH START TO SOLDIERS WHO FALTER BUT HAVE THE POTENTIAL TO SUCCEED. HOWEVER, THERE ARE CIRCUMSTANCES IN WHICH A REHABILITATIVE TRANSFER WILL SERVE NO USEFUL PURPOSE, AND THE SEPARATION AUTHORITY MAY WAIVE THE TRANSFER. SUCH CIRCUMSTANCES INCLUDE TWO CONSECUTIVE FAILURES OF THE ARMY PHYSICAL FITNESS TEST; PREGNANCY WHILE IN ENTRY LEVEL STATUS; HIGHLY DISRUPTIVE OR POTENTIALLY SUICIDAL SOLDIERS, PARTICULARLY THOSE IN RECEPTION BATTALIONS; AND SOLDIERS ASSIGNED TO SMALL INSTALLATIONS OR AT REMOTE LOCATIONS.
4. THE PROVISION LIMITING VOLUNTARY SEPARATION ON GROUNDS OF INABILITY TO OVERCOME A FIELD COMMANDER'S BAR TO REENLISTMENT TO SOLDIERS SERVING SECOND OR SUBSEQUENT ENLISTMENTS REMAINS AS SPECIFIED IN REFERENCE A.
5. EXPIRATION DATE OF THIS MESSAGE CANNOT BE DETERMINED. BT

ROUTINE  
R 071620Z APR 97  
FM DA WASHINGTON DC//DAPE-MPE//  
TO ALARACT

UNCLAS ALARACT 035/97

SUBJECT: INDEFINITE SUSPENSION OF ENLISTED SEPARATION PROGRAM

1. IN ORDER TO REDUCE ATTRITION, CONSERVE SOLDIER RESOURCES, AND MAINTAIN ARMY END STRENGTH, THE PROVISION FOR REGULAR ARMY SOLDIERS WITH A LOCAL BAR TO REENLISTMENT TO REQUEST VOLUNTARY SEPARATION ON GROUNDS OF PERCEIVED INABILITY TO OVERCOME THE BAR IS SUSPENDED INDEFINITELY. THIS APPLIES TO ALL SOLDIERS, WHETHER SERVING INITIAL OR SUBSEQUENT ENLISTMENTS.

2. PERTINENT REGULATORY PROVISIONS ARE 601-280, PARAGRAPH 8-5F, AND AR 635-200, PARAGRAPH 16-5B. LOCALLY BARRED SOLDIERS APPROVED FOR SEPARATION UNDER THE PROVISION OF AR 635-200, PARAGRAPH 16-5B, PRIOR TO RECEIPT OF THIS MESSAGE MAY SEPARATE AS SCHEDULED. HOWEVER, NO NEW REQUESTS FOR SEPARATION WILL BE APPROVED.

3. EXPIRATION DATE OF THIS MESSAGE CANNOT BE DETERMINED. BT

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## CHAPTER Q

### EQUAL OPPORTUNITY

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## I. REFERENCES. SEE APPENDIX A.

## II. INTRODUCTION.

- A. Equal Opportunity (EO) ensures “fair treatment for all persons based solely on merit, fitness, and capability in support of readiness.” ARMY REG. (AR) 600-20, PERSONNEL--GENERAL: ARMY COMMAND POLICY, para 6-1 (15 July 99).
- B. Policy. “The U.S. Army will provide equal opportunity and treatment for military personnel, family members and DA civilians without regard to race, color, gender, religion, or national origin and provide an environment free of sexual harassment. This policy:
- Applies both on and off post, during duty and nonduty hours
  - Applies to working, living, and recreational environments (including both on- and off-post housing).” AR 600-20, para 6-3a.
- C. The Army approaches EO from a soldier readiness point of view. “To accomplish any mission, leaders must ensure that their units are properly trained and that their soldiers, their equipment, and they, themselves, are in the proper state of readiness at all times. Soldiers must be committed to accomplishing the mission through unit cohesion developed as a result of a healthy leadership climate. Leaders at all levels promote individual readiness by developing competence and confidence in their subordinates. **A leadership climate in which all soldiers perceive that they are treated with fairness, justice, and equity is crucial to the development of this confidence.**” DA PAM 600-26, PERSONNEL--GENERAL: DEPARTMENT OF THE ARMY AFFIRMATIVE ACTION PLAN, para 1-4b (23 May 1990) (emphasis added).

### **III. THE ARMY'S EQUAL OPPORTUNITY PROGRAM.**

- A. Who. Applies to soldiers, Department of the Army civilians, and family members.
- B. What. "Soldiers are not accessed, classified, trained, assigned, promoted, or otherwise managed on the basis of race, color, religion, gender, or national origin." AR 600-20, para 6-3b. Two exceptions:
  - 1. Assignment and use of women soldiers.
  - 2. Support for established equal opportunity goals.
- C. When. Applies both on and off duty.
- D. Where. Applies both on and off post.
- E. How. Designed to work through the chain of command, as a command function. "Alternative agencies" serve as a safety valve for the chain of command, or when the chain of command is the problem; *see infra*.
- F. Why. Maximize human potential and ensure fair treatment to all persons based solely on merit, fitness, and capability, which support readiness. AR 600-20, para 6-1a.

### **IV. RELATION TO OTHER POLICIES, PROGRAMS, AND UNITS OF INSTRUCTION.**

- A. Although the Army's EO policy applies to soldiers, civilian employees, and family members, recognize that civilian employees enjoy additional protections.
  - 1. Title VII of the Civil Rights Act of 1964, as amended (codified at 42 U.S.C. § 2000e *et seq.*), implemented in the Army's Equal

Employment Opportunity Program. *See* AR 690-600 (CURRENTLY UNDER REVISION).

2. DA civilian employees who are covered by a collective bargaining agreement (CBA) may enjoy additional protections under the CBA.
- B. A service member's failure to comply with the Army's EO policy may amount to criminal misconduct under the UCMJ.
- C. Other programs and agencies directly or indirectly support the EO program.
1. Armed Forces Disciplinary Control Board. AR 190-24, Armed Forces Disciplinary Control Boards and Off-Installation Liaison and Operations (30 Jun 93).
  2. Housing referral program. AR 210-50, Housing Management (26 Feb 99).
  3. Other "alternative agencies"; *see infra*.
  4. Defense Equal Opportunity Management Institute, Patrick AFB, FL. <http://www.pafb.af.mil/deomi/deomi.htm>. Purpose: enhance combat readiness by fostering positive human relations throughout the diverse armed forces. Mission: serve as the center of excellence for equal opportunity and human relations and to translate increased awareness of issues into improved leadership.
- D. Assignment policy for women.
1. The Army's EO program is independent of the Army's assignment policy for women soldiers. The Army's policy on assignment of women soldiers implements the DoD Direct Ground Combat (DGC) rule.

- a. Qualified women are eligible for all assignments except to units below brigade level whose primary mission is engaging the enemy on the ground with individual or crew served weapons while being exposed to hostile fire and a high probability of direct physical contact with the hostile force's personnel.
- b. Permits exclusion of women from special operations units, long range reconnaissance units, and units that physically collocate and remain with closed units.
- c. *See* Secretary of Defense memo, 13 Jan 94, subject: Direct Ground Combat Definition and Assignment Rule. *See also* AR 600-13, Army Policy for the Assignment of Female Soldiers.

## V. STAFFING. AR 600-20, Chapter 6.

### A. Equal Opportunity **Advisor**.

- 1. Role. Understanding and articulating EO policy; recognizing and assessing indicators of discrimination; recommending remedies; collecting, organizing, and interpreting demographic data; EO training; complaint processing. EOAs may conduct inquiries in accordance with the commander's guidance.
- 2. Assigned to installations, organizations, and agencies that are brigade-level or equivalent and higher commands. Primary, full-time duty. Has direct access to commander. Commander must be EO Advisor's rater or senior rater.
- 3. Trained at DEOMI in 18-week course.
- 4. Where assigned.

- a. Brigade-level and higher units; installations to 10,000 soldiers; base support battalions: SFC (E-7) or higher.
    - b. Installations over 10,000 soldiers, and area support groups: MSG (E-8) and SFC.
    - c. MACOM: LTC/MAJ, SGM, & MSG.
  - 5. EOAs provide assistance to investigating officers conducting EO complaint investigations. AR 600-20, Appendix E-6(d).
- B. Equal Opportunity **Representative**.
- 1. Role. Assist commanders at the battalion level and below in carrying out the EO program in their units. *May not* conduct investigations.
  - 2. Assigned to battalion and company size organizations. Not a full time duty. Regulation suggests assigning SSG or SFC.

## VI. EO COMPLAINT PROCESSING.

- A. AR 600-20, Appendix E.
- B. Applies to soldiers, DA civilian employees, and family members (but DA civilian employees will generally use more specific means; *see* para IV.A.1 *supra*).
- C. Informal Complaint. AR 600-20, Appendix E-1(a).
  - 1. Any complaint that the soldier, employee, or family member does not wish to file in writing.
  - 2. Not subject to time suspense or reporting.

3. Attempted resolution at the lowest possible level.

D. Formal Complaint. AR 600-20, Appendix E-1(b).

1. Filed by submitting a sworn statement on DA Form 7279-R.

a. Basis of complaint.

b. Dates, parties, witnesses.

c. Requested remedy.

2. Timely submission required (w/in 60 calendar days of the incident).  
Processed through chain of command or alternative agency.

a. Reporting complaint to chain of command “strongly encouraged.”

b. “Alternative agencies” when complainant perceives chain of command as the problem:

(1) Higher echelons of chain of command.

(2) EO advisor.

(3) Inspector General. Investigation governed by AR 20-1, not AR 600-20. DA Form 7279-R not used. IG confidentiality policy applies. EO timelines not used.

(4) Chaplain.

(5) Provost Marshall, Criminal Investigation Command.

- (6) Medical agencies.
  - (7) Staff Judge Advocate.
  - (8) Housing referral office.
- 3. The EO complaint process, in itself, provides no promises of confidentiality. Note, however, that other regulations may provide confidentiality to complainants (e.g., Inspector General, Staff Judge Advocate).
- 4. Actions by “alternative agencies.” AR 600-20, Appendix E-2 (except IG, see Appendix E-3 and para. VI.D.2.b(3) above).
  - a. Initial actions by these alternative agencies are the same for informal and formal complaints.
  - b. Upon receipt of EO complaint, the alternative agency must: talk with the complainant, advise him/her of his/her rights and responsibilities, gather as much information as possible (including what the reasons were for using the alternative agency and what the complainant’s expectations are for resolution of the complaint), tell complainant what role (if any) that agency will have in resolving the complaint, tell complainant what support services are available from other organizations, what the complaint processing procedures are (mainly the differences between informal and formal complaints) and what will be done with the complaint. Appendix E-2.
  - c. Agency annotates receipt of formal complaint on DA Form 7279-R (except IG).
  - d. If resolution is beyond agency’s charter, refer complainant to appropriate agency or commander, with complainant’s consent. Referral must be made within 3 calendar days.



- e. Most “alternative agencies” do not have an independent investigatory charter. Exceptions: Inspectors General and higher commanders in the chain of command.
5. Investigation. *Commander* will either conduct an investigation personally or immediately appoint an investigating officer according to the provisions of AR 15-6; AR 600-20, Appendix E-4(b).
- a. Referral to battalion/brigade *commander* for appointment of investigating officer under AR 15-6.
  - b. Fourteen days (3 weekend drill periods) to complete the investigation. Possible extension of 30 days (2 weekend drill periods).
6. Feedback. Written feedback within 14 days (3 weekend drill periods) after acknowledgment of complaint.
- a. Summary of investigative results.
  - b. Remedial actions taken.
  - c. Copy provided to complainant.
7. Appeal by complainant in writing to the next higher commander, up to GCMCA.
- a. Within 7 days following notification of results of investigation and acknowledgment of actions taken by the command to resolve the complaint.
  - b. Options outside the EO system.
8. Follow up. Thirty to forty-five days after final decision on the complaint, Equal Opportunity Advisor conducts an assessment on **all**

EO complaints, substantiated and unsubstantiated, to determine effectiveness of any corrective action taken and to detect reprisal. Not recorded on DA Form 7279-R.

9. File maintained for two years.
10. Complaints against promotable colonels, active or retired GOs, IGs, members of the SES or Executive Schedule employees forwarded to Investigations Division, US Army Inspector General Agency, ATTN: SAIG-IN, Pentagon, Washington DC 20310-1700 “by rapid but confidential means within 5 calendar days of receipt.” AR 600-20, Appendix E-2d.

## **VII. SANCTIONS.**

- A. Soldiers. (AR 600-20, Appendix E-7(a)(1)).
  1. Administrative action.
  2. Action under the Uniform Code of Military Justice (UCMJ).
- B. Civilian employees.
  1. May be subjected to administrative discipline in accordance with the current Army Table of Penalties (AR 690-700, chap 751, Table 1-1).
  2. No requirement for victims to file EEO complaints. A victim may seek redress or not, as he or she sees fit, but the right of the service to discipline employees who harass or discriminate is not affected in either event. *Hostetter v. United States*, 739 F.2d 983 (4th Cir. 1984).

## VIII. OFF-POST ACTIVITIES.

### A. In the United States.

1. Establishments open to the general public.
  - a. Title II of Civil Rights Act of 1964, 42 U.S.C. §§ 2000a - 2000a-6: Public Accommodations.
  - b. Command enforcement: off-limits sanction. AR 600-20, para 6-7; AR 190-24, para 2-6.
2. Private establishments. AR 600-20, para 6-7c.
  - a. General rule: A commander may not apply off-limits sanctions to a bona fide private establishment, club, activity, or organization.
  - b. Exception: A private entity may be placed off limits if the following conditions are met:
    - (1) Open to soldiers in general or soldiers who meet specific criteria (*e.g.*, E-5 and above) but discriminate on the basis of race, color, religion, gender, or national origin against other soldiers who otherwise meet criteria.
    - (2) It is not primarily political or religious in nature.
    - (3) Commander, in consultation with SJA and other staff officers, determines facts support allegations of discrimination. Must give entity an opportunity to respond.

- (4) Commander must make reasonable efforts to bring about the voluntary termination of discriminatory practices.
- (5) Commander determines that continued discrimination will undermine morale, discipline, or loyalty of soldiers.

B. Overseas. AR 600-20, para 6-7a.

- 1. Title II does not apply.
- 2. Commander's options:
  - a. Off-limits sanction.
  - b. Local law.

C. Off-post housing policy. Designed to eliminate discrimination in housing on the basis of race, color, religion, gender, national origin, age, physical disability, or familial status.

- 1. General.
  - a. Fair Housing Act, Title VIII of the Civil Rights Act of 1968, as amended. 42 U.S.C. §§ 3601-3631.
  - b. Command enforcement: restrictive sanctions. AR 210-50, Chap 6.
- 2. Enforcement. Installation Housing Referral Office (HRO) responsibility. *See* AR 210-50. HRO, like any other staff agency, may turn to SJA for advice and assistance.

## **IX. CONCLUSION.**

## EQUAL OPPORTUNITY

### *Appendix A*

## REFERENCES

### I. FEDERAL.

#### A. U.S. Constitution.

1. 5th Amendment.
  - a) Due process clause: “No person shall be . . . deprived of life, liberty, or property, without due process of law.”
  - b) Equal protection component of due process. *Bolling v. Sharpe*, 347 U.S. 497 (1954).
2. 13th Amendment.
  - a) “Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”
  - b) Applicable to private conduct; prohibits slavery and the “badges and incidents of slavery.” *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).
3. 14th Amendment.
  - a) Equal protection clause: “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”
  - b) Does not reach Federal action or purely private action; State action required. *District of Columbia v. Carter*, 409 U.S. 418 (1973); *Loving v. Virginia*, 388 U.S. 1 (1967).

#### B. Statutes.

1. Civil Rights Acts of 1866 and 1871.
  - a) 42 U.S.C. § 1981 -- racial discrimination. *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989); *Saint Francis College v. Al-Khazraji*, 481 U.S. 604 (1987). *See also* §101, Civil Rights Act of 1991, Pub. L. No. 102-166, amending 42 U.S.C. § 1981.
  - b) 42 U.S.C. § 1982 -- racial discrimination in the acquisition, holding, and sale of real and personal property. *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615 (1987); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

- c) 42 U.S.C. § 1983 -- violations of federal rights under color of state law. *District of Columbia v. Carter*, 409 U.S. 418 (1973); *Monroe v. Pape*, 365 U.S. 167 (1961).
  - d) 42 U.S.C. § 1985(3) -- conspiracies to deprive persons of their civil rights. *United Brotherhood of Carpenters & Joiners v. Scott*, 463 U.S. 825 (1983).
- 2. Civil Rights Act of 1964.
  - a) Title II -- public accommodations. 42 U.S.C. §§ 2000a - 2000a-6.
  - b) Title VI -- federally assisted housing. 42 U.S.C. § 2000d.
  - c) Title VII -- Federal employment. 42 U.S.C. § 2000e-16. Applied to federal civilian employees by the Equal Opportunity Act of 1972. Not applicable to uniformed members of the armed forces.
- 3. Fair Housing Act, Title VIII of the Civil Rights Act of 1968, as amended. 42 U.S.C. §§ 3601-3631.
- 4. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified at 42 U.S.C. § 1981a).

## **II. DEPARTMENT OF DEFENSE.**

- A. DoD Dir 1350.2, Department of Defense Military Equal Opportunity Program (18 Aug 95 and Change 1, 13 Jun 97).
- B. DODI 1350.3, Affirmative Action Planning and Assessment Process (29 Feb 1988).
- C. DODI 1100.16, Equal Opportunity in Off-Base Housing (14 Aug 89).
- D. Department of Defense Human Goals Charter.

## **III. ARMY.**

- A. AR 190-24, Armed Forces Disciplinary Control Boards and Off-Installation Liaison and Operations (30 Jun 93).
- B. AR 210-50, Housing Management (26 Feb 99).
- C. AR 600-20, Army Command Policy (15 July 1999).





**CHAPTER R**  
**MILITARY PERSONNEL LAW**  
**ARMY SUBSTANCE ABUSE PROGRAM**

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## **Outline of Instruction**

### **I. REFERENCES.**

- A. AR 215-1, Morale, Welfare, and Recreation: Nonappropriated Fund Instrumentalities and Morale, Welfare, and Recreation Activities, 25 October 1998.
- B. AR 600-85, Army Substance Abuse Program, 1 October 2001.
- C. AR 635-200, Personnel Separations: Enlisted Personnel, 1 November 2000.
- D. AR 600-8-24, Officer Transfers and Discharges, 21 July 1995.
- E. DA Pamphlet 600-85, Army Substance Abuse Program Civilian Services, 15 October 2001.
- F. Executive Order 12564, Federal Drug-free Workplace Program; DoD Directive 1010.9, Civilian Employee Drug Abuse Testing Program, 23 August 1988.

### **II. INTRODUCTION.**

- A. Army Policy.

*Abuse of alcohol or the use of illicit drugs by both military and civilian personnel is inconsistent with Army values and the standards of performance, discipline, and readiness necessary to accomplish the Army's mission.*

AR 600-85, para 1-31

B. Definitions.

1. Alcohol Abuse. Any irresponsible use of an alcoholic beverage which leads to misconduct, unacceptable social behavior, or impairment of an individual's performance of duty, physical or mental health, financial responsibility, or personal relationships. AR 600-85, Glossary, at 68.
2. Drug Abuse. The use or possession of controlled substances or illegal drugs, or the nonmedical or improper use of other drugs (for example, prescription drugs) that are packaged with a recommended safe dosage. Also includes the use of substances for other than their intended use (for example, glue and gasoline fume sniffing) or steroid use for other than that which is specifically prescribed by competent medical authority. AR 600-85, Glossary, at 69.

C. The Army's Substance Abuse Program (ASAP) represents a tension between two policies: *rehabilitation* of soldiers with a genuine substance abuse problem, and *readiness*, i.e. the military's necessary intolerance of the adverse impact of drug abuse (including alcohol abuse) on mission.

D. You'll see this tension reflected in:

1. ASAP policies and regulations, including the limited use policy.
2. Military Rule of Evidence 313.
3. Separation procedures.

E. JA's role. Why should you be concerned about ASAP?

1. Personally subject to the policies.
2. Supervisor of others (military and civilian) subject to the policies.

3. Legal advisor to commanders, administrative separation boards.
4. Trial counsel, government representative before boards.
5. Advocate for soldiers (legal assistance, Trial Defense Service).

**III. PROGRAM OBJECTIVES.** AR 600-85, para 1-30, details the objectives of the Army's ASAP.

- A. Increase individual fitness and overall unit readiness.
- B. Provide services, which are adequate and responsive to the needs of the total workforce and emphasize alcohol and other drug abuse deterrence, prevention, education, and treatment.
- C. Implement alcohol and their drug risk reduction and prevention strategies that respond to potential problems before they jeopardize readiness, productivity, and careers.
- D. Restore to duty those substance-impaired soldiers who have the potential for continued military service.
- E. Provide effective alcohol and other drug abuse prevention and education at all levels of command, and encourage commanders to provide alcohol and drug-free leisure activities.
- F. Ensure all military and civilian personnel assigned to ASAP staffs are appropriately trained and experienced to accomplish their mission.
- G. Achieve maximum productivity and reduce absenteeism and attrition among DA civilian employees by reducing the effects of the abuse of alcohol and other drugs.

- H. Improve readiness by extending services to the total Army.
- I. Ensure quality customer service.

#### **IV. ALCOHOL SANCTIONS.**

- A. An administrative separation action will be initiated and processed to the separation authority for decision of soldiers involved in two serious incidents of alcohol related misconduct in a year, such as more than one instance of drunk on duty or operating a motor vehicle while intoxicated. AR 600-85, para 1-34.
- B. Military personnel on duty will not have a blood alcohol level equal to or greater than .05 grams of alcohol per 100 milliliters of blood. Any violation provides a basis for disciplinary action under the UCMJ and a basis for administrative action, to include the characterization of service at separation.
  - 1. A soldier must have reasonably known prior to becoming impaired that he/she had official military duties to perform.
  - 2. Commanders by order or regulation may set local alcohol limits below .05 percent for soldiers on duty or prohibit the use of alcohol entirely during deployments, as they deem necessary for mission accomplishment and to meet local conditions.
- C. Soldiers diagnosed as alcohol dependent will be detoxified and given appropriate medical treatment. Those who warrant retention based on their potential for continued service will be offered treatment and retained. Soldiers who are to be separated will be referred to a Veterans Administration hospital or a civilian program by the ASAP clinician to continue (or to initiate) their treatment.

## **V. ILLEGAL DRUG SANCTIONS.**

- A. All soldiers, to include Army National Guard (ARNG) and United States Army Reserve (USAR) soldiers ordered to active duty under Title 10 U.S. Code, who are identified as drug abusers, without exception, will:
  - 1. Be referred to the ASAP counseling center for screening.
    - a) Nondependent drug users will be enrolled in the ASAP if clinically recommended and the unit commander concurs.
    - b) Drug dependent soldiers should be detoxified and given appropriate medical treatment. These soldiers generally do not have potential for continued military service and should not be retained.
  - 2. Be considered for disciplinary action under the UCMJ, as appropriate.
  - 3. Be processed for administrative separation under AR 600-8-24 (for officers and warrant officers) and AR 635-200 (for enlisted personnel), with the exception of self-referrals. In cases where the chain of command has referred the matter to a trial by court-martial, administrative separation proceedings will be delayed until the completion of the court-martial process.
- B. Separation for Misconduct. Commanders must initiate separation action for misconduct under AR 600-8-24 or AR 635-200 and process the action to the separation authority for all soldiers involved in illegal trafficking, distribution, possession, use, or sale of illegal drugs. Under the provisions of AR 635-200, paragraph 14, soldiers in the grade of sergeant and above, and all soldiers with 3 years or more of total military service, active and reserve, will be processed for separation upon discovery of a drug offense. Additionally, all soldiers must be processed for separation after a second offense.

1. Soldiers must also be considered for disciplinary action under the UCMJ, consistent with the Limited Use Policy and Rule for Courts-Martial 306.
  2. Initiation of administrative separation proceedings is not required when:
    - a) Charges have been referred to a court-martial empowered to adjudge a punitive discharge; or
    - b) Drug use is discovered through self-referral.
- C. Hemp Seed Oil. Hemp seed oil may contain varying levels of tetrahydrocannabinol (THC), an active ingredient of marijuana that is detectable under the Army Drug Testing Program. To ensure military readiness, the ingestion of hemp seed oil or products made with hemp seed oil is prohibited. Failure to comply with this prohibition is a violation of Article 92, UCMJ.

## **VI. ELIGIBILITY AND JURISDICTION.**

- A. ASAP services are authorized for personnel who are eligible to receive military medical services or eligible for medical services under the Federal Civilian Employees Occupational Health Services Program. In addition to military personnel, eligibility includes:
1. U.S. citizen DoD civilian employees, to include both appropriated and nonappropriated fund employees;
  2. Foreign national employees where Status of Forces Agreements or other treaty arrangements provide for medical services; and
  3. Retired military personnel.

- B. Other service personnel under the administrative jurisdiction of an Army installation commander are subject to the regulation.
- C. Members of the ARNG and USAR who are not on active duty are eligible to use ASAP services on a space/resource available basis.

## **VII. PREVENTION.**

- A. Alcohol and other drug abuse prevention policies. See AR 600-85, chap 2.
  - 1. Prevention efforts emphasize cooperation and partnerships within the total community and encourage military involvement in local civilian community alcohol and other drug prevention efforts.
  - 2. Alcohol deglamorization is an essential element of the Army prevention program. All members of the military community will be provided with the information needed to make responsible decisions about personal use of alcohol.
  - 3. Marketing and promotion practices that glamorize alcohol use are prohibited.
  - 4. Alcohol consumption during duty hours at the workplace is prohibited unless specifically authorized by the first General Officer/installation commander in the chain of command.
  - 5. Alcohol will not be served by the drink on Army installations to soldiers on duty. AR 215-1, para 7-14h. Exceptions to this provision may be granted by the first general officer in the chain of command, to include frocked general officers.
  - 6. Minimum drinking age on Army installations.



- a) In the US, the Army follows state law. AR 215-1, para 7-7c. Army policy provides for limited exceptions for soldiers only (not applicable to family members or guests):
  - (1) Remote installations where privately owned vehicles are not available for soldiers. Installation commanders may request exceptions from the Department of the Army. AR 215-1, para 7-7c(1).
  - (2) Substantial risk of increased incidence of intoxicated driving by soldiers driving to and from a jurisdiction with a lower drinking age (an international border). To qualify, the installation must be within 50 miles or 1 hour's driving time of the neighboring international border with the lower drinking age. Installation commanders may request exceptions from the Department of the Army. AR 215-1, para 7-7c(2).
  - (3) Camaraderie exception. "[I]nfrequent, nonroutine military occasions when an entire unit, as a group, marks a uniquely military occasions at a military installation such as the conclusion of arduous military duty or the anniversary of the establishment of a military service or organization." Approved by the installation commander. AR 215-1, para 7-7c(3).
- b) Overseas. 18 years, or according to treaty. AR 215-1, para 7-7a.

B. Education.

- 1. Substance abuse and risk reduction training will occur at initial entry and pre-commissioning.
- 2. All soldiers will receive a minimum of 4 hours of alcohol and other drug awareness training per year.

3. Supervisory substance abuse prevention and risk reduction education and training for individuals with command and/or first line supervisory (that is, Sergeant to Captain) responsibility will occur within 60 days after designation of those responsibilities.
4. ASAP prevention education and training for DA civilian employees will be provided in conjunction with, but not be limited to, existing civilian personnel orientations and training programs. All civilians will receive a minimum of 3 hours of alcohol and other drug awareness training per year.
5. Education for family members on a voluntary basis.
6. Alcohol and Drug Abuse Prevention Training (ADAPT). AR 600-85, para 2-6h(3).
  - a) 12 hours of instruction focusing on the adverse effects and consequences of alcohol and other drug abuse.
  - b) ADAPT training is permitted for the following military personnel.
    - (1) Those referred and screened but not enrolled in the ASAP treatment program. These personnel generally have been identified as first time abusers and do not require treatment.
    - (2) Those referred, screened, and enrolled in the treatment program. ADAPT may be included as part of individualized treatment plans.
    - (3) Those referred directly by the unit commander for reasons related to poor performance, safety violations, high-risk behaviors, and disciplinary problems.

(4) Those who volunteer for the course with the permission of their commander.

c) 6-month follow-up period.

d) Referral to rehabilitation, or other appropriate services, is an option at any point.

C. Enforcement and Drug Suppression Activities. AR 600-85, para 2-9.

1. Eliminate the supply of illegal drugs.
2. Identify and apprehend individuals who illegally possess, use, or traffic in illegal drugs.
3. Prevent alcohol and other drug related crimes, incidents, and traffic accidents.

## **VIII. IDENTIFICATION.**

A. Voluntary self-identification.

1. Most desirable method of discovering alcohol or other drug abuse.
2. Identification resulting from a soldier seeking emergency treatment for an actual or possible alcohol or other drug overdose, not subsequent to a traffic accident or criminal offense, is considered to be a variation of volunteering.
3. ASAP clinic staff conducts an initial interview during which the clinician advises the soldier of his or her unit commander's role in the referral, evaluation, and treatment process, or other disposition,

explains the limited use policy, and provides information about ASAP services.

B. Commander/supervisor identification.

1. Based on observation, suspicion, informant, or other identification of an individual whose job performance, social conduct, interpersonal relationships, physical fitness, or health appears adversely affected because of suspected abuse of alcohol or other drugs.
2. When the commander identifies a soldier as a probable alcohol or other drug abuser, the commander or designated representative must:
  - a) Coordinate with law enforcement about whether the commander or law enforcement should conduct the initial interview of the abuser;
  - b) Coordinate with the ADCO and supporting legal advisor if the commander believes the limited use policy may apply and if it applies, explain the limited use policy to the soldier; and
  - c) If law enforcement does not initiate an investigation, advise soldiers of their Article 31, UCMJ rights, interview the soldier (if the soldier waives his or her rights), and inform the soldier of the evidence.
  - d) If law enforcement does not initiate an investigation, give soldiers the opportunity to provide additional evidence, including information on drug sources and collect any illegal drugs or drug paraphernalia that the soldier may voluntarily relinquish.

C. Biochemical testing.

1. Purposes.

- a) Deter soldiers from abusing drugs.
- b) Facilitate early identification of alcohol and other drug abuse.
- c) Enable commanders to assess the security, military fitness, good order and discipline of their units, and to use information obtained to take appropriate action.
- d) Monitor rehabilitation of those enrolled for alcohol and other drug abuse.
- e) Collect data on the prevalence of alcohol and other drug abuse within the Army.

2. Minimum rate of testing. One random sample per active duty soldier per year. Soldiers in the USAR and ARNG will mirror the active duty rate, to the maximum extent possible.

3. Biochemical testing programs. There are eight circumstances for urinalysis testing of soldiers. AR 600-85, para 8-3.

- a) Inspection. An inspection is an examination of a unit, or part thereof, conducted as a function of command, the primary purpose of which is to ensure the security, military fitness, or good order and discipline of the unit, and is conducted pursuant to MRE 31.
- b) Search or Seizure/Probable Cause.

- c) Competence for Duty. A commander may direct urinalysis testing to determine the soldier's competence for duty or need for counseling, rehabilitation, or other medical treatment if the commander has reason to question the soldier's competence for duty based on aberrant, bizarre, or uncharacteristic behavior, breaching of discipline, or other similar behavior. *This test may be based on less than probable cause.*
- d) Rehabilitation. Testing is required as part of the alcohol or other drug rehabilitation program. Frequency of testing is determined in the rehabilitation plan.
- e) Mishap or Safety Inspection. Following an accident that may be considered a safety mishap, a specimen may be collected from any individual directly or indirectly involved. Samples which are collected in compliance with the Military Rules of Evidence may be used for any lawful purpose. Samples may also be collected for mishap investigatory purposes only and may not satisfy the requirements of the MRE for admissibility in a court-martial.
- f) Consent. A specimen may be provided voluntarily as part of a consent search under MRE 314(e).
- g) New Entrant. Urinalysis testing may be required during the pre-accession physical or initial period of military service.
- h) Medical. Testing may be required during any medical examination for a valid medical purpose to preserve the health of the soldier (e.g., emergency treatment, periodic physical examinations, and such other medical examinations as are necessary for diagnostic or treatment purposes under MRE 312).

4. Medical Identification and Investigation and/or Apprehension.

- a) A physician or health care provider during routine or emergency medical treatment may note apparent alcohol or other drug abuse. In such cases, the physician or health care provider will refer the individual to the ASAP counseling center, who will notify the soldier's commander.
- b) A soldier's alcohol or other drug abuse may be identified through military or civilian law enforcement investigation and/or apprehension. Referral for screening or enrollment does not interfere with or preclude pending legal or administrative actions.

## **IX. SCREENING AND MEDICAL EVALUATION.**

- A. Unit commanders must refer individuals suspected or identified as alcohol and/or drug abusers, including those identified through urinalysis or blood alcohol tests, to the ASAP counseling center for screening.
- B. An initial screening interview is conducted with all individuals referred for screening or who voluntarily seek treatment.
  - 1. The ASAP clinician will explain the limited use policy.
  - 2. If further in-depth assessment is warranted, the ASAP clinician will advise the unit commander and initiate a comprehensive assessment.
- C. If a unit commander believes a soldier does not have potential for future service, the soldier will be processed for administrative separation. If treatment is clinically indicated, the soldier will be provided treatment until separated.

- D. Medical evaluation. The unit commander, supervisor, counselor, or soldier may request a medical evaluation by a physician at any time to determine the extent of alcohol or other drug abuse. A medical evaluation is required in cases of suspected alcohol and drug dependence, and in all other cases prior to entry into an ASAP partial inpatient care program.

## **X. REHABILITATION. AR 600-85, Chapter 4.**

### **A. Objectives.**

1. Return soldiers to full duty as soon as possible.
2. Identify soldiers who cannot be rehabilitated within scope of program.
3. Assist and refer soldiers who cannot be rehabilitated in the ASAP to a treatment facility in the vicinity where they reside after discharge from the Army.
4. Help resolve alcohol and other drug abuse problems in the family, with the ultimate goal of enabling the soldier to perform more effectively.

- B. Rehabilitation Team. After the ASAP clinical services staff has completed the individual assessment, the rehabilitation team convenes to review the results of the assessment and develop treatment options. The team is composed of the soldier, unit commander/1SG, the ASAP clinical staff, and others as appropriate. The ASAP clinician, with the input of the rehabilitation team may recommend:

1. Counseling by the unit commander or designated representative;
2. Referral to other agencies (e.g., chaplain, marriage counselor, mental health activity, AA);



3. No ASAP services required at the present time;
  4. Referral to ADAPT; or
  5. Enrollment in ASAP rehabilitation. If enrollment is required, the frequency, length of counseling sessions, and level of treatment must be determined by the team. In the event of a disagreement about treatments, the MTF commander has final authority.
- C. Rehabilitation/Treatment Program. The treatment plan is based on the severity of the individual's involvement with substance abuse and may provide for individual, group, or family counseling on either an outpatient or inpatient basis. Program design is structured within the scope of individualized, short-term treatment.
1. The type and frequency of treatment varies depending upon the soldier's needs.
  2. If a relapse occurs during rehabilitation, the unit commander will be notified promptly and the rehabilitation team must determine an appropriate course of action.
  3. Methadone maintenance will not be used and Disulfiram (Antabuse) will not be mandatory.
- D. Detoxification.
1. Involves the medical management of the withdrawal from alcohol or other drugs.
  2. Decision to hospitalize will be made by a physician.
  3. Line of duty determination is not required, unless a physician determines a patient to be incapacitated for a consecutive period of

more than 24 hours. IN such cases, the determination will be “Not in Line of Duty Due to Own Misconduct” only for the period of actual incapacitation.

## **XI. LIMITED USE POLICY. AR 600-85, Chapter 6, § II.**

- A. The Limited Use Policy (LUP) prohibits the use of certain evidence against a soldier in actions under the Uniform Code of Military Justice or in administrative separation actions on the issue of characterization of services. Think of the policy as a limited safe haven for soldiers who are voluntarily seeking help. See chart at Appendix A.
- B. Objectives. AR 600-85, para 6-3.
  - 1. To facilitate the identification of alcohol and drug abusers through self-referral, and the treatment and rehabilitation of those abusers who desire to be rehabilitated and who demonstrate the potential for retention.
  - 2. A shield, not a sword. Not intended to protect a soldier who is attempting to avoid disciplinary or adverse administrative action.
- C. What does LUP protect? AR 600-85, para 6-4a.
  - 1. A soldier’s self-referral to ASAP.
  - 2. Admissions and other information concerning drug or alcohol abuse or possession of drugs *incidental to personal use* occurring *prior to the date of initial* referral to ASAP provided voluntarily by a soldier as part of his or her initial entry into ASAP or during a scheduled interview.
  - 3. Information concerning illegal drug or alcohol use or possession *incidental to personal use* obtained solely as a result of a soldier’s

emergency medical care for an actual or possible drug or alcohol overdose. To qualify, soldiers must inform their unit commander of the facts and circumstances of the actual or possible overdose. If the medical treatment resulted from an apprehension by military or civilian law enforcement authorities, or if the admission for treatment resulted from other than abuse of alcohol or drugs, such as for injuries resulting from a traffic accident, the limited use protection will not be available to the soldier.

4. Command-directed biochemical testing that is inadmissible under the MRE. This includes competence for duty testing when the commander has a reasonable suspicion that a soldier is using a controlled substance or has a blood alcohol level of .05 percent or above while on duty. Distinguish competence for duty testing from probable-cause searches (not protected by LUP) and valid health and welfare inspections under MRE 313 (not protected by LUP).
5. Biochemical tests results, if the soldier voluntarily submits to a DoD or Army treatment program before the soldier has received an order to submit for a lawful biochemical test.
6. Biochemical test results collected solely as part of a limited use safety mishap investigation undertaken for accident analysis and the development of countermeasures.

D. LUP does ***not*** prohibit:

1. Other adverse administrative actions such as written reprimands, bars to reenlistment, revocation of security clearances, or reductions for inefficiency may be based on limited use evidence;
2. Evidence obtained through independent means, including evidence of continued drug abuse after initial entry into the program; and

3. Using otherwise-LUP barred evidence for *impeachment or rebuttal* in any proceeding in which the *evidence of drug abuse (or lack thereof) first has been introduced by the soldier*.
- E. Impact of the government introducing LUP-protected evidence. *Beware of government witnesses inadvertently introducing or referring to LUP-protected evidence.*
1. Administrative separation actions. Respondent gets an honorable discharge. AR 600-85, para 6-5c. “Gov’t” includes the initiating commander, all forwarding commanders (in documents going to the board), members of the board of officers, the IO or recorder presenting the case to the board, and the separation authority.
  2. UCMJ actions. Remedy will be fashioned by the military judge.

## **XII. CIVILIAN EMPLOYEES.**

- A. Policy. See DA Pam 600-85, para 1-4.
1. DA civilian employees must refrain from using drugs illegally whether on or off duty.
  2. Supervisors will intervene early when alcohol misuse, drug abuse, or other personal problems are adversely affecting an employee’s job performance and/or behavior.
  3. DA civilian employees will have access to confidential Employee Assistance Program (EAP) Services. Civilian employees have the option of participating in either the installation ASAP clinical program (if resources are available) or being referred to an approved program in the civilian community.

4. Employee job security or promotion opportunities will not normally be jeopardized by a request for assistance. Employee performance appraisals will not mention current or past enrollment in the ASAP.
- B. The Army's Drug-Free Federal Workplace Testing Designated Positions (TDP). AR 600-85, para. 14-20.
1. Twelve (12) categories of TDPs, characterized by critical safety or security responsibilities. Additional TDPs may be designated by the MACOM, DA, or DOD.
  2. TDPs are subject to random testing
- C. Urinalysis Testing Program.
1. Reasonable suspicion testing.
    - a) All DA civilians are subject to biochemical testing when there is a reasonable suspicion of on duty use or on duty impairment. Reasonable suspicion = an articulable belief that an employee uses illegal drugs drawn from specific and particularized facts and reasonable inferences from those facts.
    - b) DA employees in TDPs are subject to reasonable suspicion testing when there is a reasonable suspicion that an employee uses illegal drugs, whether on or off duty.
    - c) Notification to test is prepared by the supervisor and approved by the next higher level supervisor after coordination with the SJA and Civilian Personnel Advisory Center (CPAC).

2. Accident or unsafe practice testing. Employees may be subject to testing when their actions are reasonably suspected of having caused or contributed to an accident that results in a death or personal injury requiring immediate hospitalization or in damage to government property estimated in excess of \$10,000.
  3. Voluntary testing.
  4. Follow-up testing. All DA civilians who have successfully completed rehabilitation and/or are enrolled in rehabilitation for illegal drug use may be subject to unannounced follow-up testing for 12 months. The supervisor must obtain a written agreement that the employee is aware of the requirement for follow-up testing.
  5. Applicant testing. DA applicants tentatively selected for appointment to TDPs are required to participate in applicant drug urinalysis testing.
  6. Random testing. DA civilian employees in TDPs are subject to random testing.
- D. Department of Transportation (DOT) Drug and Alcohol Testing Program. See AR 600-85, Chap 14, § V.
1. Requires alcohol and other drug testing of individuals who operate commercial motor vehicles in any state.
  2. DA civilian drivers to whom DOT rules apply are subject to testing, including: pre-employment testing; post-accident testing; reasonable suspicion testing; random testing; follow-up testing; and return-to-duty testing.
- E. Challenges to Federal drug testing programs.

1. Skinner v. Railway Labor Executive's Assoc., 489 U.S. 602 (1989) (compelling governmental interest in safety).
2. Nat'l Treasury Emp'ees Union v. Von Raab, 489 U.S. 656 (1989) (law enforcement).

F. Challenges to military testing programs.

1. Am. Fed'n of Gov't Emp'ees Local 1533 v. Cheney, 944 F.2d 503 (9th Cir. 1991) (Navy); Nat'l Fed'n of Fed. Emp'ees v. Cheney, 884 F.2d 603 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1056 (1990).
2. Thomson v. Marsh, 884 F.2d 113 (4th Cir. 1989) (Army).

### **XIII. CONCLUSION.**

## APPENDIX A

### ALCOHOL AND DRUG ABUSE PREVENTION AND CONTROL PROGRAM (ADAPCP)

#### THE ADAPCP LIMITED USE POLICY

PROTECTED	NOT PROTECTED
1. Act of voluntary self-referral by member.	1. Involuntary or command referral by “them”: commander, Military Police, civilian police, etc.
2. Voluntary admissions of use and possession incidental to personal use.	2. Voluntary admissions of sale, transfer, other crimes, etc. (anything other than personal use or personal possession).
3. Voluntary admissions made as part of initially enrolling in the program.	3. Voluntary admissions made before enrolling or requesting assistance.
4. Voluntary admission made after enrollment, if to doctor or counselor, concerning pre-enrollment use.	4. Voluntary admissions not made during treatment or not made to a doctor or counselor, or regarding post-enrollment use.
5. Information obtained as a result of emergency medical care (voluntary or overdose) concerning personal use or possession.	5. Information obtained as a result of emergency medical care ordered by MPs or supervisors, or not concerning personal use or personal possession.
6. Urine and breath test results obtained as a result of a:  a. Commander’s suspicion concerning fitness for duty.  b. ASAP monitoring tests.	6. Urine and breath test results obtained as a result of:  a. Probable cause searches.  b. Inspections (MRE 313).
7. LUP evidence in separation proceedings on the issues of characterization of service.	7. LUP evidence on the issue of separation (but soldier will get honorable discharge).
8. LUP evidence in UCMJ actions (Art. 15 or court-martial).	8. Independently obtained evidence, or LUP evidence used to rebut or impeach respondent’s or defense’s misrepresentations.



**CHAPTER S**  
**MILITARY PERSONNEL LAW**  
**DOD HIV / AIDS POLICY AND THE LAW**

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## **Outline of Instruction**

### **I. INTRODUCTION.**

### **II. REFERENCES.**

- A. DoD Directive 6485.1, Human Immunodeficiency Virus-1 (HIV-1), 19 March 1991.
- B. Army Regulation 600-110, Identification, Surveillance, and Administration of Personnel Infected with Human Immunodeficiency Virus (HIV) (1 June 1996).
- C. Centers for Disease Control and Prevention. HIV/AIDS Surveillance Report, 1997; Vol. 9, No.1. (Copies of the HIV/AIDS Surveillance Report are available free from the CDC National AIDS Clearinghouse, P.O. Box 6003, Rockville, MD 20849-6003; telephone 1-800-458-5231 or 1-301-519-0023.)

### **III. THE DISEASE.**

- A. In General.
- B. Disease Progression.
- C. Detection.
- D. Transmission.
- E. Classifications. DODD 6485.1, E2.2; AR 600-110, para. 2-1b. See also Appendix A, this outline.

### **IV. DOD AND SERVICE POLICIES.**

- A. Accession Testing. HIV positive personnel are not eligible for enlistment or appointment in the military, both Active and Reserve Component. DODD 6485.1, para. 4.1; AR 600-110, para. 1-14a.
  - 1. HIV screening for enlisted applicants is conducted at Military Entrance Processing Stations (MEPS). DODD 6485.1, para. 4.2; AR 600-110, para. 3-3b.

2. Officer applicants are screened during pre-contracting, pre-scholarship, or pre-appointment physical examinations. DODD 6485.1, E5; AR 600-110, para. 3-3h.
  - a. U.S. Military Academy cadets, midshipmen and persons attending the Uniformed Services University of Health Sciences are separated and discharged with an honorable discharge if HIV positivity is the sole basis for discharge. The Superintendent may delay separation until the end of the current academic year or allow graduation in final year. DODD 6485.1, para. E5.1.3; AR 600-110, para. 3-3h(1).
  - b. ROTC cadets are disenrolled at the end of the academic term in which the HIV infection is confirmed. No recoupment action is initiated. DODD 6485.1, para. E5.1.2; AR 600-110, para. 3-3h(2).
  - c. OCS candidates who are in their initial entry training are disenrolled from the program and discharged with an honorable or entry level separation, as appropriate. DODD 6485.1, para. E5.1.1; AR 600-110, para. 3-3h(3).
  - d. OCS candidates who have completed entry level training are disenrolled, reassigned in their original enlisted specialty and administered in accordance with Service regulations for enlisted personnel. DODD 6485.1, para. E5.1.1 AR 600-110, para. 3-3h(3).
  - e. No waiver for HIV infection is authorized.
  - f. All personnel disenrolled from officer programs who are separated shall be given preventive medicine counseling and advised to seek civilian treatment.
3. Prior service personnel required to meet accession medical fitness standards must have a negative HIV test no more than 6 months before enlistment in the Selected Reserves. Active duty soldiers transferring to or enlisting in the Selected Reserves without a break in service must have a negative HIV test within the preceding 24 months. AR 600-110, para 3-3g.

B. Disease Surveillance.

1. DOD Policy (DODD 6485.1, para. E6.2) requires periodic testing with the following priority for military personnel:
  - a. Deployed or deploying to high HIV risk area,
  - b. Permanent assignment overseas,
  - c. Temporary deployment overseas,
  - d. Specific categories (medical personnel, drug and alcohol rehab, prenatal patients) per service regulation, and,
  - e. All remaining personnel per service regulation.
2. Army. Active duty and Reserve Component soldiers are periodically screened for evidence of HIV infection.
  - a. All active duty soldiers are tested routinely at least biennially. AR 600-110, paras. 2-2h and 2-7. Testing is keyed to birth month screening. AR 600-110, para. 2-7b.
  - b. Active duty and Reserve Component soldiers who PCS to overseas (defined as outside the 50 states, Puerto Rico, and the District of Columbia) must have a negative HIV test within the 6 months prior to their portcall. AR 600-110, paras. 2-2k and 2-7e.
  - c. Active duty soldiers who are scheduled for overseas TDY or deployment that will not exceed 179 days must have a negative HIV test within the 24 months prior to the departure date. AR 600-110, para. 2-2k(1).
  - d. Active duty personnel scheduled for overseas TDY or deployment exceeding 179 days must have a negative HIV test within the 6 months prior to departure date. AR 600-110, para. 2-2k(2).
  - e. Reserve Component soldiers are tested every 5 years. Reserve Component soldiers may also receive testing during their periodic physicals. AR 600-110, paras. 2-2i and 2-8.

- f. Reserve Component personnel scheduled for overseas duty: Less than 30 days - 24 months prior to departure date. Greater than 30 days - 6 months prior to their reporting date. AR 600-110, para. 2-2k(3).
- 3. Navy. SECNAVINST 5300.30C, para. 5
  - a. Assigned to a deployable unit or stationed overseas (including Reserves) - annual testing.
  - b. PCS Orders – within 12 months prior to report date.
  - c. Treated for STD, drug/alcohol abuse, or pregnancy.
  - d. All others, during routine physical.
- 4. Air Force. AFI 48-135, para. 3.2.
  - a. Every 5 years during physical exam (flight physical every 3 years).
  - b. Prior to overseas assignment.
  - c. Treatment for pregnancy, STD, or drug/alcohol abuse.
- 5. Family members and other health care beneficiaries are not required to have an HIV test. However, DA policy is to routinely inform patients that physicians will order any necessary clinically indicated tests, to include HIV, unless the patient specifically declines such tests. DODD 6485.1, para. E6.2.5. Generally, HIV testing is “clinically indicated” under the circumstances listed below:
  - a. All blood donors;
  - b. All patients with suspicious illnesses;
  - c. All persons admitted to Army hospitals unless tested during the proceeding twelve months;
  - d. All persons seen at sexually transmitted disease clinics;

- e. Certain blood recipients;
- f. Sexual partners of HIV-infected individuals;
- g. All pregnant women at the time of their initial prenatal evaluation and at time of delivery, if the mother is identified as at high risk;
- h. All persons enrolled in alcohol and drug rehabilitation programs (Tracks II or III);
- i. Adults undergoing physical examinations;
- j. All persons presenting at emergency rooms with evidence of trauma, such as shootings, stabbings, IV drug use, and rape;
- k. All persons with acute or chronic hepatitis B infection; and
- l. All persons who are dead on arrival or die in emergency rooms.

6. DOD Civilians.

- a. Civilian employees and applicants for employment may not be mandatorily tested for HIV except to comply with valid host nation laws. DODD 6485.1, para. 6.10.
- b. HIV-positive civilian employees are treated no differently than other employees. They are permitted to work as long as their performance is acceptable and they do not pose a significant safety or health threat to themselves or others. They are considered handicapped employees within the meaning of the Rehabilitation Act of 1973 and are entitled to a reasonable accommodation if otherwise qualified. AR 600-110, paras. 1-14k, l, and m.

C. Health Education. DODD 6485.1, para. E6.3.

- 1. Upon identification, military health authorities will counsel the individual and others at risk regarding:
  - a. Significance of a positive antibody test;

- b. Mode of transmission of the virus;
  - c. Appropriate precautions, personal hygiene, and measures required to minimize transmission;
  - d. Need to advise any past and future sexual partners of their infection;
  - e. That they are ineligible to donate blood, organs, or semen;
  - f. To always use condoms (except with a spouse who is fully informed of the soldier's condition).
  - g. Counseling is recorded on DA Form 5669-R. Commanders will receive a copy of this form. AR 600-110, para. 2-14d.
  - h. Soldiers who violate the preventative medicine counseling are subject to administrative separation. AR 600-110, paras. 4-12e and 4-13c.
2. The medical assessment of each exposure to or case of HIV infection includes an epidemiological assessment (EPI) of the potential transmission of HIV to other persons. AR 600-110, para. 7-3.
3. Commander's Counseling. The Army specifically provides for Commander Counseling. AR 600-110, para. 2-14.
- a. Commanders formally counsel soldiers who test positive for the HIV antibody immediately after the post-diagnosis preventive medicine counseling. Commander counseling includes:
    - (1) A direct order to verbally advise all sexual partners of their infection prior to engaging in intimate sexual behavior or other behavior involving a significant risk of HIV transmission (such as behavior that would result in the exchange of blood or seminal fluid between persons);

- (2) A direct order to use condoms when engaging in sexual relations (including, but not limited to, sexual intercourse, oral-genital, or anal-genital contact) with persons other than their spouse or with their spouse unless the spouse freely and knowingly consents to such relations after being informed of the soldier's infection (See also AR 600-110, para. 2-13b(9);
  - (3) A direct order not to donate blood, sperm, tissues, or other organs; and
  - (4) A direct order to inform all health care workers of their infection when seeking medical or dental treatment.
- b. Commanders record counseling on DA Form 4856 (General Counseling Form) (see Appendix B, this outline). AR 600-110 includes a reproducible sample form. **(NOTE:** The form is not completely consistent with the 1994 update to AR 600-110. *Compare* DA Form 4856 *with* AR 600-110, para. 2-14c.
- c. Commanders maintain the counseling form in unit personnel files. Upon reassignment, commanders forward the form in a sealed envelope to the gaining commander. AR 600-110, paras. 2-14d and 2-17.
- d. Air Force Instruction includes a sample order for infected personnel to 1) inform sex partners prior to relations, 2) use transmission protection during sex (e.g. condom), 3) inform emergency care providers of HIV status, 4) inform medical providers of HIV status, and 5) not donate blood, sperm, tissue or organs. AFI 148-135, A14.
- e. Navy regulation does not provide for command counseling or a formal preventative HIV order.

#### D. Retention.

- 1. Repeal of 10 Feb 96 statute mandating immediate discharge of HIV-positive service members. Repeal of amendments to 10 U.S.C. § 1177 effective 24 Apr 96.
- 2. Current Policy.



- a. Active duty personnel with evidence of HIV infection are referred for medical evaluation board to evaluate and document their fitness for continued service regardless of clinical staging. DODD 6485.1, para. 4.3 and E2.4.2
- b. HIV positive service members are managed in the same manner as personnel with other progressive illnesses.
- c. Soldiers meeting medical retention standards may reenlist, if otherwise eligible. AR 600-110, para. 4-5a.
- d. Personnel showing no evidence of clinical illness (generally associated with WR-1 or WR-2 stages) or other indications of immunologic or neurologic impairment related to HIV infection are not separated solely on the basis of HIV positivity. DODD 6485.1, para. 4.3; AR 600-110, para. 1-14d.
- e. Reserve Component soldiers with serologic evidence of HIV infection have 120 days to complete a medical evaluation to determine their fitness for continued reserve service. Reservists found medically fit are permitted to serve in the Selected Reserves in a nondeployable billet, if available. AR 600-110, para. 5-17.

E. Assignment Limitations - Current Policy.

- 1. HIV-positive service members are not deployed overseas (defined as outside the 50 states, Puerto Rico, and the District of Columbia). DODD 6485.1, para. 6.16; AR 600-110, paras. 1-14e and 4-2a.
- 2. Soldiers confirmed HIV positive while stationed overseas are reassigned to the United States as soon as possible, regardless of PCS rules. AR 600-110, para. 4-7.
- 3. HIV-positive soldiers are NOT assigned to:
  - a. Any TOE or MTOE unit. Installation commanders may reassign any HIV-infected soldier to TDA units on their installation, if the soldier has completed a normal tour. AR 600-110, para. 4-2b; or

- b. USAREC, Cadet Command, or ARNG Full Time Recruiting Force if the soldier's medical condition requires frequent follow up and the unit is not near an Army MTF capable of providing such treatment. Commanders must report these soldiers to PERSCOM for assignment instructions. AR 600-110, para. 4-2b(3).
  - c. Military education programs resulting in additional service obligation. AR 600-110, para. 4-2b(2). This limitation does not apply to military schools required for career progression, such as an advanced course or CGSC. See also AR 600-110, para. 4-4.
- 4. Assignment preclusion from units, programs, organizations, or schools other than those listed in the regulation require HQDA (DAPE-HR) approval. AR 600-110, para. 4-2c.
- 5. Commanders may not reassign an infected soldier unless required by regulation or the soldier's medical condition. AR 600-110, para. 4-2d.
- 6. Commanders may not group HIV-infected soldiers into the same unit, duty area, or living area unless no other unrestricted units, positions, or accommodations are available. AR 600-110, para. 4-2d.
- 7. Commissioned officers in DOD sponsored professional education programs are disenrolled from the program at the end of the academic term in which the HIV infection is confirmed. Any additional service obligation incurred by participation in the program is waived. Financial assistance received is not subject to recoupment. AR 600-110, para. 4-2b.
- 8. Family members who are confirmed as HIV positive may accompany their sponsor overseas. The sponsor may request deletion from the overseas assignment based on compassionate reasons or may request an "all others" tour. If the initial diagnosis of a family member occurs while overseas, the sponsor may apply for a compassionate reassignment to the United States. Mandatory PCS of the sponsor will not occur based solely on the HIV positivity of the family member. AR 600-110, para. 4-3 and 6-12.
- 9. Comply with host nation requirements of HIV screening for DOD civilians. DODD 6485.1, para. 4.10

F. Separation.

1. “Individuals with serological evidence of HIV-1 infection who are fit for duty shall not be retired or separated solely on the basis of ...HIV-1 infection.” DODD 6485.1, para.4.3
2. Regular and Reserve Component service members who are determined to be unfit for further duty due to progressive clinical illness or immunological deficiency due to HIV infection are processed for separation or retirement. DODD 6485.1, para. 4.5.
  - a. Regular Army and Reserve Component commissioned and warrant probationary officers, who are confirmed HIV positive within 180 days of their original appointment or who report for initial entry training in an AD status (other than ADT) and are confirmed HIV positive within 180 days of reporting to AD, are processed for discharge under the provisions of AR 635-100, Chapter 5, section IX (Elimination of Probationary Officers). AR 600-110, para. 4-12d.
  - b. Enlisted soldiers, confirmed HIV positive within 180 days of initial entry on AD, are separated for the convenience of the government for failure to meet procurement medical fitness standards under the provisions of AR 635-200, paragraph 5-11. See AR 600-110, para. 4-13b.
  - c. HIV-positive military personnel who fail to comply with lawfully ordered preventive medicine procedures, including the commander’s “safer sex” order, are subject to appropriate administrative and disciplinary actions, including separation. AR 600-110, paras. 4-12e, 4-13c, and 2-14c.
  - d. HIV-positive military personnel may request separation from the service for the convenience of the government. AR 600-110, paras. 4-12a, b, and 4-13a, b.

G. Limited Use Policy.

1. DOD policy (DODD 6485.1, para. E3) prohibits the use of HIV testing information and information obtained during the EPI as an independent basis for adverse administrative or disciplinary action, except for:
  - a. Accession separations;
  - b. Voluntary separations;

- c. Armed Service Blood Look Back activities;
  - d. Rebuttal or Impeachment purposes consistent with law or regulation;
  - e. For administrative or disciplinary actions resulting from disobeying preventative medicine order; and
  - f. As an element of proof or aggravation in administrative or criminal action.
2. **Adverse personnel actions** include: court-martial; nonjudicial punishment; line of duty determination; involuntary separation action (other than for medical reasons); administrative or punitive reduction in grade; denial of promotion; a bar to reenlistment; as the basis for an unfavorable entry in a personnel record; as a basis to characterize service or to assign a separation program designator; or in any other action considered an adverse personnel action (e.g., OER or NCO-ER). DODD 6485.1, para. E3.2.1; AR 600-110, para. 7-3b.
3. The limited use policy does not apply to:
- a. The introduction of evidence for impeachment or rebuttal purposes in any proceeding in which the evidence of drug abuse or relevant sexual activity (or lack thereof) is first introduced by the soldier.
  - b. Disciplinary or other action based on independently derived evidence.
  - c. **Nonadverse personnel actions** include such as reassignment; disqualification (temporary or permanent) from a personnel reliability program; denial, suspension, or revocation of a security clearance; suspension or termination of access to classified information; and removal (temporary or permanent) from flight status or other duties requiring a high degree of stability or alertness such as explosive ordnance disposal (a medical evaluation board must determine whether removal from flight status or a similar position is necessary). DODD 6485.1, para. E3.2.3; AR 600-110, para. 4-6.
  - d. Any evidence or information derived from sources independent of the epidemiological assessment. AR 600-110, para. 7-4d.

H. Release of Information.

1. HIV data on a soldier is covered by the Privacy Act (5 U.S.C. § 552a).
2. Release is on an internal agency “need to know basis.” 5 U.S.C. 552a(b)(1).
3. The service regulations stress the need for extra precautions in protecting HIV records. See, e.g., AR 600-110, paras. 1-12g, 1-13f, 1-14n, and 1-14o(3).
  - a. All soldiers are individually and privately notified of all positive HIV test results in a face-to-face interview with a designated physician. AR 600-110, para. 2-12.
  - b. Unit commanders will accompany HIV-positive soldiers to the initial notification by medical personnel. Unit commanders will not remain for the EPI. AR 600-110, para. 1-13d.
  - c. MEDDAC/MEDCEN will notify commander if HIV-positive soldier requires change in profile status.
4. IAW AR 600-110, para. 2-12f, information concerning an individual’s HIV positivity is only released outside DOD in the following circumstances:
  - a. Military health care beneficiaries who are determined “at risk” (e.g., spouse of an HIV-positive soldier; See also AR 600-110, para. 6-9) are contacted directly by medical authorities and advised to seek medical evaluation;
  - b. Individuals who are not military health care beneficiaries, who are determined “at risk” (e.g., sexual partner of an unmarried HIV-positive soldier), are contacted through the local public health authorities, unless disclosure to the civilian health authorities is itself prohibited by the jurisdiction.
  - c. Release of information to local (including host nation) health authorities, concerning the identity of HIV-positive individuals, is done in accordance with the reporting requirements of the local jurisdiction.

5. Spouses of Reserve Component HIV-positive soldiers are notified and offered an opportunity for voluntary HIV testing and counseling. AR 600-110, para. 6-9b.

## **V. CONCLUSION.**

## APPENDIX A

<b>GENERAL COUNSELING FORM</b> <small>For use of this form, see AR 635-200; the proponent agency is MILPERCEN</small>					
DATA REQUIRED BY THE PRIVACY ACT OF 1974					
AUTHORITY: 5 USC 301, 10 USC 3012 (G). PRINCIPAL PURPOSE: To record counseling data pertaining to service members. ROUTINE USES: Prerequisite counseling under paragraphs 5-8, 5-13, chapters 11, 13 or section III, chapter 14, AR 635-200. May also be used to document failures of rehabilitation efforts in administrative discharge proceedings. DISCLOSURE: Disclosure is voluntary, but failure to provide the information may result in recording of a negative counseling session indicative of the subordinate's lack of a desire to solve his or her problems.					
PART I - BASIC DATA					
1. NAME <div style="text-align: center;">Doe, John Q.</div>	123-45-6789	3. GRADE <div style="text-align: center;">E4</div>	4. SEX <div style="text-align: center;">Male</div>		
5. UNIT  <div style="text-align: center;">HHC, 1st Training Brigade</div>	<div style="text-align: center; font-size: small;">FOR TRAINING UNITS ONLY</div> <table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 50%; padding: 5px; vertical-align: top;">           6. WEEK OF TRAINING         </td> <td style="width: 50%; padding: 5px; vertical-align: top;">           7. TRAINING SCORES             HIGH ____ MED ____ LOW ____         </td> </tr> </table>			6. WEEK OF TRAINING	7. TRAINING SCORES  HIGH ____ MED ____ LOW ____
6. WEEK OF TRAINING	7. TRAINING SCORES  HIGH ____ MED ____ LOW ____				
PART II - OBSERVATIONS					
8. DATE AND CIRCUMSTANCES  <p>The purpose of this command counseling is to inform you of DA and command policy regarding your responsibilities as a result of testing positive for the Human Immunodeficiency Virus (HIV) antibody. This counseling supplements and complements the preventive medicine counseling you received on 20 FEB 01.</p>					
9. DATE AND SUMMARY OF COUNSELING  <p>I have been advised that you were counseled by Preventive Medicine personnel concerning your diagnosis of HIV positivity, the risk this condition poses to your health, as well as the risk you pose to others. You were advised by medical personnel as to necessary precautions you should take to minimize the health risk to others as a result of your condition. While I have great concern for your situation and needs, in my capacity as a commander, I must also be concerned with, and ensure the health, welfare, and morale of the other soldiers in my command. Therefore, I am imposing the following restrictions:</p> <ul style="list-style-type: none"> <li>a. You will verbally advise all prospective sexual partners of your diagnosed condition prior to engaging in any sexual intercourse. You are also ordered to use condoms should you engage in sexual intercourse with a partner.</li> <li>b. You will not donate blood, sperm, tissues, or other organs since this virus can be transmitted via blood and body fluids.</li> <li>c. You will notify all health care workers of your diagnosed condition if you seek medical or dental treatment, or accident requires treatment. If you do not understand any element of this order, you will address all questions to me. Failure on your part to adhere to your preventive medicine counseling or the counseling I have just given you will subject you to administrative separation and/or punishment under the UCMJ, as I see fit.</li> </ul>					
<small>DISPOSITION INSTRUCTIONS</small> <small>This form will be destroyed upon : reassignment (other than rehabilitative transfers), separation at ETS, or upon retirement</small>					

**CHAPTER S**  
**MILITARY PERSONNEL LAW**  
**DOD HIV / AIDS POLICY AND THE LAW**

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# ADMINISTRATIVE AND CIVIL LAW DEPARTMENT

## ***BASIC COURSE DESKBOOK***



### **Part III**

### **Civilian Personnel Law**

The Judge Advocate General's School  
United States Army

March 2002

JA 280

## CHAPTER T

### EQUAL EMPLOYMENT OPPORTUNITY

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#### Outline of Instruction

## **I. INTRODUCTION.**

## **II. EQUAL EMPLOYMENT OPPORTUNITY -- STATUTORY FRAMEWORK.**

A. Title VII, Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-2000e-17, prohibits:

1. Basis: Discrimination on basis of race, color, religion, sex, or national origin in connection with any personnel action; retaliation or reprisal for having engaged in protected activity.
2. Persons covered: Applicants for employment, employees, and former employees.
3. Issues: Fail or refuse to hire, discharge, or otherwise discriminate in compensation, terms, conditions, or privileges of employment; limit, segregate, or classify in a way to adversely affect person.

B. Age Discrimination in Employment Act, 29 U.S.C. § 633a, prohibits:

1. Basis: Discrimination on basis of age 40 and over; retaliation or reprisal for having engaged in protected activity.
2. Persons covered: Applicants for employment, employees, and former employees.
3. Issues: Fail or refuse to hire, discharge, or otherwise discriminate in compensation, terms, conditions, or privileges of employment; limit, segregate, or classify in a way to adversely affect; or reduce wages.

- C.     Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 790-794, and modified by the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213:
  - 1.     Basis: Discrimination on the basis of handicapping condition (disability); failure to reasonably accommodate qualified handicapped.
  - 2.     Persons covered: Applicants for employment, employees, and former employees.
  - 3.     Issue: Test applicant to screen out handicapped; fail or refuse to hire, discharge, or otherwise discriminate in compensation, terms, conditions, or privileges of employment; limit, segregate, or classify in a way to adversely affect; or reduce wages, or be denied "reasonable accommodation" if accommodation does not impose undue hardship on agency.
  - 4.     Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101-12213, provides protections to private-sector employees similar to those provided federal employees in the Rehabilitation Act and modifies and codifies portions of the Rehabilitation Act. The ADA modifies the term "qualified handicapped individual" to "a qualified individual with a disability." These terms are used interchangeably in this outline.
- D.     The Equal Pay Act (29 U.S.C. § 206(d)) requires equal pay for equal work.
- E.     The Civil Rights Act of 1991, Pub. L. No. 102-166 (codified at scattered sections of 42 U.S.C.), provides for the recovery of compensatory damages of up to \$300,000 from the federal government. Punitive damages are not recoverable from the federal government

### **III.   EQUAL EMPLOYMENT OPPORTUNITY AGENCIES.**

- A.     Equal Employment Opportunity Commission (EEOC).

- B. Merit Systems Protection Board (MSPB). 5 U.S.C. § 7702. The Civil Service Reform Act of 1978 (5 U.S.C. § 7702) provides for the processing of "mixed cases:" a personnel action that is (1) otherwise appealable and (2) allegedly motivated by prohibited discrimination.

#### IV. EEO SUBSTANTIVE ANALYSIS.

- A. Theories of Discrimination and Methods of Proof.
  - 1. Disparate Treatment.
  - 2. Definition. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977): "The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin."
  - 3. Proof of discriminatory motive essential. *Palmer v. Shultz*, 815 F.2d 84 (D.C. Cir. 1987), *remanded* 905 F.2d 84 (1990); *Equal Employment Opportunity Comm. v. General Telephone Co. of Northwest, Inc.*, 885 F.2d 575 (9th Cir. 1989).
  - 4. The shifting burdens.
    - a. Plaintiff's prima facie case. *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *U.S. Postal Service v. Aikens*, 460 U.S. 711 (1983); *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742 (1993); *Harding v. Gray*, 9 F.3d 150 (D.C. Cir. 1993).
      - (1) Member of protected class.
      - (2) Qualified for job.
      - (3) Rejected/discharged.
      - (4) Employer filled job with someone else or still seeking similarly qualified applicants. *Washington v. Garrett*, 10 F.3d 1421 (9th Cir. 1994).

- (5) Additional "background circumstances" usually required to establish an inference of discrimination in "reverse" discrimination cases. *Harding v. Gray*, 9 F.3d 150 (D.C. Cir. 1993); *Mills v. Health Care Serv. Corp.*, 171 F.3d 450, 457 (7th Cir. 1999); *Duffy v. Wolle*, 123 F.3d 1026, 1036-37 (8th Cir. 1997); *Reynolds v. School Dist. No. 1*, 69 F.3d 1523, 1534 (10th Cir. 1995); *Notari v. Denver Water Dep't*, 971 F.2d 585, 588-89 (10th Cir. 1992); *Murray v. Thistledown Racing Club, Inc.*, 770 F.2d 63, 66-67 (6th Cir. 1985). *But see* *Iadimarco v. Runyon*, 190 F.3d 151, 163 (3d Cir. 1999).
- b. Defendant's burden of production. Articulate legitimate nondiscriminatory reason. *Furnco Construction Co. v. Waters*, 438 U.S. 567 (1978); Burdine.
- c. Plaintiff's rebuttal. *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742 (1993); McDonnell-Douglas; Furnco; Burdine.
  - (1) Employer's explanation unworthy of belief (pretext); and
  - (2) Discriminatory reason for action more likely.
- d. Ultimate burden of proof remains with plaintiff. *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742 (1993); *U.S. Postal Serv. v. Aikens*, 460 U.S. 711 (1983); *Comer v. Brown*, 13 F.3d 404 (10th Cir. 1994) (table); *Cosgrove v. Sears, Roebuck, & Co.*, 9 F.3d 1033 (2d Cir. 1993); *LeBlanc v. Great American Ins. Co.*, 6 F.3d 836 (1st Cir. 1993); *Odom v. Frank*, 3 F.3d 850 (5th Cir. 1993); *Rennie v. Dalton*, 3 F.3d 1100 (7th Cir. 1993), cert. den., 114 S. Ct. 1054 (1994).
- e. A finding of liability under the Equal Pay Act does not support a finding of discrimination under Title VII absent a specific finding of intentional discrimination. *Meeks v. Computer Assocs. Int'l*, 15 F.3d 1013 (11th Cir. 1994).

B. "Mixed Motive" Discrimination Cases.

1. Law before the CRA 1991. A plaintiff proves prohibited discrimination was a contributing factor in the decision and the defendant proves by a preponderance of evidence that it would have taken the same employment action absent the prohibited discrimination. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).
2. Current Law. Section 107 of the Civil Rights Act of 1991 modifies the "but for" test in *Price Waterhouse*. An employee who demonstrates that discrimination was "a motivating factor for any employment practice" has proven an unlawful employment practice. 42 U.S.C. § 2000e-2(m). *Fuller v. Phipps*, 67 F.3d 1137 (4th Cir. 1995).
  - a. The employer can avoid full liability only by demonstrating by clear and convincing evidence it would have taken the same action in the absence of discrimination. 42 U.S.C. § 2000e-5(g)(2)(B). *Tanca v. Nordberg*, 98 F.3d 680 (1<sup>st</sup> Cir. 1996), cert. den., 117 S.Ct. 1253 (1997).
  - b. The employee is still entitled to declaratory and injunctive relief recovery of attorney's fees and costs. *Russell v. Microdyne Corp.*, 65 F.3d 1229, 1237 (4th Cir.1995).
- C. Disparate impact. The Civil Rights Act of 1991 § 105, overruled portions of the Supreme Court's decision in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), and established statutory burdens of proof in disparate impact cases. 42 U.S.C. § 2000e-2.
  1. Definition (Int'l Brotherhood of Teamsters): "[E]mployment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity."
  2. Although traditionally applied to invalidate tests or fixed qualification standards, may be applied to cases where subjective criteria are used to make employment decisions. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988).
  3. No proof of discriminatory motive is required. Typically attacks systemic or mechanical discrimination.

4. Plaintiff's prima facie case. 42 U.S.C. § 2000e-2(k)(1)(A).
  - a. Member of protected class.
  - b. Rejected/discharged/segregated/etc. by facially neutral employment practice.
  - c. Demonstrate (meet burden of production and persuasion--generally with statistical evidence) that each employment practice being challenged adversely affects protected class in disproportionate numbers (or that practices cannot be separated for analysis).
5. Defendant's rebuttal.
  - a. Under Section 105 of the CRA 1991, the **burden of proof** shifts to the employer to demonstrate that the employment practice is job related for the position in question and consistent with business necessity. 42 U.S.C. § 2000e-2(k)(1)(A)(i).
  - b. The employer can also rebut the underlying statistics (e.g., wrong labor market, incomplete data, inadequate techniques) or show that other factors account for the discrepancy. 42 U.S.C. § 2000e-2(k)(1)(B)(2). See also Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989)(reversing disparate impact finding for improper use of statistics); Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988); Equal Employment Opportunity Comm'n v. Chicago Miniature Lamp Works, 947 F.2d 292 (7th Cir. 1991); Valentino v. U.S. Postal Serv., 674 F.2d 56 (D.C. Cir. 1982); Maddox v. Claytor, 764 F.2d 1539 (11th Cir. 1985).
6. Plaintiff's reply. Even if defendant satisfies its burden of proof, a plaintiff can prevail by proving that an alternative business practice, which the employer refused to adopt, would have satisfied the employer's business needs without causing such an adverse impact.



D. Retaliation and Reprisal.

1. Elements. *Atkinson v. Bd. of Regents*, 4 F.3d 984 (4th Cir. 1993); *Malarky v. Texaco, Inc.*, 983 F.2d 1204 (2d Cir. 1993); *Miller v. Williams*, 590 F.2d 317 (9th Cir. 1979).
  - a. Individual engaged in protected activity. 42 U.S.C. § 2000e-3.
    - (1) Opposition clause.
    - (2) Participation clause.
  - b. Adverse employment action taken against the employee.
  - c. Causal connection between protected activity and adverse action.
    - (1) An inference that a causal connection exists can arise where the individual shows that employer was aware of the protected activity and the adverse action follows the protected activity closely in time. Atkinson.
    - (2) Protected activity by one employee can protect another from retaliation. *Equal Employment Opportunity Comm'n v. Ohio Edison Co.*, 7 F.3d 541 (6th Cir. 1993).
2. Employer defenses.
  - a. Legitimate, non-retaliatory reasons for adverse action. *Atkinson v. Bd. of Regents*, 4 F.3d 984 (4th Cir. 1993); *Butler v. Dep't of Agric.* 826 F.2d 409 (5th Cir. 1987).
  - b. Decision to take adverse action made before protected activity. *Newton v. Leggett*, 7 F.3d 1042 (8th Cir. 1993).

- c. Lack of knowledge of prior protected activity. *Jackson v. Brown*, 5 F.3d 546 (10th Cir. 1993); *Malarky v. Texaco, Inc.*, 983 F.2d 1204 (2d Cir. 1993); *Acosta v. Univ. of the District of Columbia*, 528 F. Supp. 1215 (D.D.C. 1981).
  - d. Prolonged period of time between protected activity and adverse action negates presumption of causal connection. *Johnson v. Dep't of Health & Human Servs.*, 30 F.3d 45 (6th Cir. 1994); *Clark v. Chrysler Corp.*, 673 F.2d 921 (7th Cir. 1982).
- E. Handicap (Disability) Discrimination--reasonable accommodation. 29 C.F.R. § 1614.203.
  - 1. Three theories to support claim of handicap (disability) discrimination:
    - a. Disparate treatment (treating disabled employees less favorably than non-disabled employees);
    - b. Disparate impact; and
    - c. Failure to reasonably accommodate in hiring, placement, or advancement opportunities.
  - 2. The plaintiff's burden in disability discrimination cases parallels Title VII disparate treatment analysis:
    - a. Proof by direct evidence; or
    - b. Proof by circumstantial evidence establishing a *prima facie* case of disability discrimination--
      - (1) The employee suffers from a disability;
      - (2) is qualified for the job;
      - (3) was subject to an adverse employment action; and

- (4) was replaced by a non-disabled person or was treated less favorably than non-disabled employees. *See Daigle v. Liberty Life Ins. Co.*, 70 F.3d 394 (5th Cir. 1995).
  - c. The burden of production then shifts to the employer to articulate a valid, nondiscriminatory reason for its actions.
- 3. Plaintiff's prima facie case in accommodation cases: Demonstrate that plaintiff is "qualified handicapped person" ("qualified individual with a disability"). *Owens v. U.S. Postal Serv.*, 37 F.3d 1326 (8th Cir. 1994); *Sargent v. Dep't of Air Force*, 55 M.S.P.R. 387 (1993).
  - a. Disabled person--has a record of having, or is regarded as having a physical or mental impairment that substantially limits one or more major life activity. 42 U.S.C. § 12102(2); 29 C.F.R. § 1630.2; *Cook v. State of Rhode Island*, 10 F.3d 17 (1st Cir. 1993); *Ruiz v. U.S. Postal Svc.*, 59 M.S.P.R. 76 (1993).
  - b. Qualified handicapped (individual)--Can perform essential functions of position, with/without reasonable accommodation. *Carr v. Reno*, 23 F.3d 525 (D.C. Cir. 1994).
  - c. Performance will not endanger health or safety of employee or others. *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987); *Lassiter v. Dep't of Justice*, 60 M.S.P.R. 138 (1993).
- 4. Defenses.
  - a. Plaintiff not "qualified handicapped person" ("qualified individual with disability"). *Bradley v. Univ. of Texas Cancer Center*, 3 F.3d 922 (5th Cir. 1993); *Jasany v. U.S. Postal Serv.*, 755 F.2d 1244 (6th Cir. 1985); *Vernon v. Veterans Admin.*, 54 M.S.P.R. 486 (1992); *Cohen v. Dep't of Army*, 46 M.S.P.R. 369 (1990).
    - (1) Agency is not obligated to assign employee to permanent light duty. *Bauman v. Dep't of Navy*, 55 M.S.P.R. 209 (1992).

- (2) Reassignment as reasonable accommodation. Agencies must offer to reassign a qualified disabled employee to a funded vacant position located in the same commuting area and serviced by the same appointing authority, unless the agency can demonstrate that the reassignment would impose an undue hardship or disruption on the agency. 29 C.F.R. § 1614.203(g). *Fedro v. Reno*, 21 F.3d 1391 (7th Cir. 1994)(holding that an agency need not establish a new position to accommodate a handicapped employee); *Ignacio v. U.S. Postal Serv.*, 30 M.S.P.R. 471 (Spec. Pan. 1986); *Savage v. Dep't of Navy*, 36 M.S.P.R. 148 (1988).
  - (3) For purposes of reassignment, "agency" is military department, not Dep't of Defense. *Brown v. Dep't of Navy*, 53 M.S.P.R. 537 (1992).
- b. The accommodation would impose an undue hardship on agency's operation. *Vande Zande v. State of Wisconsin Dep't of Admin.*, 44 F.3d 538 (7th Cir. 1995) (finding that the financial condition of an employer is only one consideration in determining whether accommodation otherwise reasonable would impose undue hardship); *Treadwell v. Alexander*, 707 F.2d 473 (11th Cir. 1983); *Bolstein v. Dep't of Labor*, 55 M.S.P.R. 459 (1992); *Cohen v. Dep't of Army*, 46 M.S.P.R. 369 (1990); *Widger v. VA*, 37 M.S.P.R. 368 (1988).
- c. Agency "good faith" attempts to accommodate will preclude recovery of compensatory damages. 42 U.S.C. § 1981a(a)(3); *Hocker v. Dep't of Transp.*, 63 M.S.P.R. 497 (1994).
- d. When an employee fails to cooperate, such as failing to submit sufficient medical evidence that would have allowed the agency to determine what accommodation, if any, was appropriate, the agency may proceed with ongoing removal actions. [In this case it was for AWOL.] The Commission noted that the process of identifying a reasonable accommodation is an interactive one, i.e., one in which petitioner and agency work together to identify petitioner's specific physical limitations, identify potential accommodations, and assess how effective each would be. In this case the agency attempted to engage in a dialogue; however, the record reflects that petitioner would not participate. In such a case, the Commission concludes that the agency cannot be held liable

for failing to accommodate. *Medlock v. Dep't of Air Force*, EEOC Petition No. 03970126 (1998).

5. Alcoholism and drug dependence as handicapping conditions; accommodating the alcoholic or drug addict. *Lazenby v. Dep't of Air Force*, 66 M.S.P.R. 514 (1995); *Anderson v. Dep't of Transportation*, 59 M.S.P.R. 585 (1993); 42 U.S.C. § 2000e-2(k)(3); 29 C.F.R. § 1614.203(h).
  - a. In the recent past, alcoholism was viewed as a disability. Reasonable accommodation of an alcoholic required: (1) counseling; (2) a “firm choice” between treatment and discipline (last chance agreement); (3) outpatient treatment; (4) inpatient treatment; and (5) discharge. If the employee does not complete rehabilitation, chooses not to participate, or falls off the wagon, he can be removed. However, no discipline allowed before a firm choice given. *Crewe v. OPM*, 834 F.2d. 140 (8th Cir. 1987); *Rogers v. Lehman*, 869 F.2d. 253 (4th Cir. 1989).
  - b. The current EEOC position is that federal employers are no longer required to provide the reasonable accommodation of a firm choice because the Rehabilitation Act Amendments of 1992 changed the applicable standard. The EEOC noted that Section 104(c)(4) of the ADA (29 U.S.C. § 12114 (c)(4)) permits a covered employer to hold an employee who is an alcoholic to the same qualification standards for employment, or job performance and behavior, as other employees. *Johnson v. Babbitt*, EEOC Appeal No. 03940100 (March 28, 1996).
  - c. In a separate case, the MSPB held that the EEOC’s decision in *Johnson v. Babbitt* had a reasonable basis and adopted the EEOC rule for the appellant and future cases. The MSPB went on to state: “In so doing we overrule *Harris*, 57 M.S.P.R. 124; *Banks v. Department of the Navy*, 57 M.S.P.R. 141 (1993); and *Carlton*, 44 M.S.P.R. 477, as well as all other Board decisions that may be interpreted to require imposition of the firm choice rule following the effective date of the Rehabilitation Act Amendments of 1992, October 29, 1992.” *Kimble v. Navy*, 70 M.S.P.R. 617 (1996).

- d. Employee involved in on-duty accident while driving under the influence of alcohol (DUI) in a government van which damaged government property, resulted in physical injury to him, and endangered others was NOT a qualified person with a disability under the Rehabilitation Act, and, thus, the employee did not have any right to reasonable accommodation by agency for his alcoholism. *Coates v. Dep't. Navy*, 74 M.S.P.R. 362 (1997).
  - e. While agencies are no longer obligated by the ADA and the Rehabilitation Act to provide accommodations formerly required for alcoholics, they may voluntarily do so because the wording of the law is that they "may" hold such employees to the same standards to which they hold others. Moreover, where employee shows that he has a right to such accommodation under agency's own rules and that right has been denied, he has proven affirmative defense of harmful procedural error rather than disability discrimination. *Army Regulation 600-85*, paras 5-4 and 5-5, require postponing adverse action for 90 days for employees enrolled in ADAPCP at the time it initiates adverse action and to forebear from taking an adverse action upon achievement of a successful result. *Humphrey v. Dep't. of Army*, 76 M.S.P.R. 519, (1997).
  - f. **NOTE:** Under the ADA, any person "who currently and knowingly uses or possesses a controlled substance" is excluded from the protections of the ADA.
- F. Sexual Harassment. "Neither men nor women should have to run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living." *Henson v. Dundee*, 682 F.2d 897 (11th Cir. 1982).
- 1. Definition. 29 C.F.R. § 1604.11(a). Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature, when:
    - a. Submission to or rejection of such conduct is made either explicitly or implicitly a term or condition of an individual's employment;

- b. Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or
  - c. Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.
- 2. Army Regulation 600-20: Any soldier or civilian employee:
  - a. In a supervisory or command position who uses or condones implicit or explicit sexual behavior to control, influence, or affect the career, pay, or job of another soldier or civilian employee is engaging in sexual harassment.
  - b. Who makes deliberate or repeated unwelcome verbal comments, gestures, or physical contact of a sexual nature is engaging in sexual harassment.
  - c. Under AR 600-20, sexual harassment is not limited to the workplace, but can occur at almost any place, and violates acceptable standards of integrity and impartiality required of all Army personnel. It interferes with mission accomplishment and unit cohesion. "Such behavior by soldiers or Army civilians will not be tolerated."
- 3. Title 10 U.S.C. Section 1561 (111 Stat. 1629 (1997)). The National Defense Authorization Act for Fiscal Year 1998 added section 1561 to Title 10 of the United States Code.
  - a. The section includes a definition of sexual harassment similar (but not identical) to the definition in DoD Dir. 1350.2 and AR 600-20. This new statutory definition is broader than the Title VII definition of sexual harassment.
  - b. Condonation by persons in supervisory positions **and** deliberate or repeated unwelcome gestures or comments of a sexual nature in the workplace by any member of the armed forces or any DoD civilian employee, are both sufficient to constitute sexual harassment.

- c. 1561 complaint procedure when military member alleges sexual harassment: [See directive-type memorandum from Assistant Secretary of Defense for Force Management, SUBJECT: DoD Interim Policy for Implementation of 10 U.S.C. 1561, Sexual Harassment Investigations and Reports, dated February 25, 1998.]
  - (1) The DoD policies and procedures governing investigating and reporting sexual harassment complaints shall be used. Therefore, the provisions of AR 600-20 (EO Complaint Process) will apply.
  
- d. 1561 complaint procedure when DoD civilian alleges sexual harassment: [See directive-type memorandum from Assistant Secretary of Defense for Force Management, SUBJECT: Interim Policy for DoD Implementation of 10 U.S.C. 1561: Sexual Harassment Investigations and Reports for Civilian Employees of the Military Services, dated February 9, 1999.]
  - (1) Establish a separate POC to handle 10 USC §1561 complaints. That person should be separate from the EEO Officer to avoid any perceived conflict-of-interest issues.
  - (2) The 1561 POC shall, within 48 hours after initial contact by an aggrieved person, submit in writing as detailed a description as possible of the allegation to the appropriate commanding officer or military officer-in-charge.
  - (3) Within 72 hours of receipt of written notification from a 1561 POC, a commanding officer, or officer-in-charge shall
    - (a) Forward the complaint or a detailed description of the allegation to the next superior officer in the chain of command who is authorized to convene a general court-martial;
    - (b) Commence, or cause the commencement of, an investigation of the complaint; and



- (c) Advise the complainant of the commencement of the investigation.
- (4) Duration of investigation.--To the extent practicable, a commanding officer shall ensure that the investigation of the complaint is completed not later than 14 days after the date on which the investigation is commenced.
- (5) If it is not practical to complete the investigation in 14 days, the commanding officer shall submit a report on the progress made in completing the investigation to the General Court-Martial Convening Authority within 20 days of the start of the investigation and every 14 days thereafter until it is completed.
- (6) Report on investigation.--To the extent practicable, a commanding officer receiving such a complaint shall--
  - (a) Determine if the allegations have been substantiated within 3 days of receipt of the investigation report;
  - (b) Notify the aggrieved person in writing within 6 days of receipt of the investigation findings of the investigation findings, the decision made on substantiation of the allegations and the decision on corrective action taken or proposed;
  - (c) Submit a final report on the results of the investigation, including any action taken as a result of the investigation, to the General Court-Martial Convening Authority (within 20 days from the start of the investigation, if practicable).
- (7) If the aggrieved civilian employee raises the complaint with the EEO Office rather than with the 1561 POC, the EEO Counselor should determine if the civilian employee is *directly* supervised by a military commanding officer of military officer-in-charge.

- (a) If not, the EEO Counselor will continue with the EEO procedures of 29 C.F.R. §1614 (discussed earlier in outline).
- (b) If so, the EEO Counselor will advise the civilian employee of the 1561 POC and inform the civilian employee that he or she must contact the 1561 POC in order to file a complaint under those provisions. The EEO Counselor shall then continue processing the complaint under the EEO procedures of 29 C.F.R. §1614 (discussed earlier in outline).

4. Types of Sexual Harassment.

- a. Old Terms. Traditionally, federal courts categorized sexual harassment claims as Quid Pro Quo or Hostile Work Environment:
  - (1) "Quid Pro Quo." A request for sexual favors in return for a job benefit, or in connection with the threat of the loss of a job, grade, or an unfavorable performance rating if the employee fails to grant the requested favors.
  - (2) "Hostile Work Environment." Deliberate or repeated verbal comments, gestures, or physical contact of a sexual nature that create an offensive or hostile workplace.
- b. New Terms: The Supreme Court appears to reject the traditional model in two decisions handed down in 1998. In Ellerth, the Supreme Court discussed whether the "quid pro quo" and "hostile environment" terms had outlived their usefulness. "The terms quid pro quo and hostile work environment are helpful, perhaps in making a rough demarcation between cases in which threats are carried out and those where they are not or are absent altogether, but beyond this they are of limited utility." Burlington Indus., Inc. v. Ellerth, 118 S.Ct. 2257, 2264 (1998). It appears the new labels for sexual harassment are "tangible employment action" harassment and "hostile work environment" harassment.

- (1) “Tangible Employment Action” harassment. Sexual harassment that results in a negative tangible employment action. This type of harassment almost invariably involves harassment by the supervisor.
  - (a) The action must constitute a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits. Burlington Indus., Inc. v. Ellerth, 118 S.Ct. 2257, 2268 (1998).
  - (b) A tangible employment action would not include a “bruised ego,” a demotion without change in pay, benefits, duties, or prestige, or a reassignment to a more inconvenient job. Id. at 2268.
  - (c) Although direct economic harm is an important indicator of a tangible adverse employment action, it is not the sine qua non. If employer’s act substantially decreases employee’s earning potential and causes significant disruption in his or her working conditions, a tangible employment action may be found. Durham Life Insurance Co. v. Evans, 166 F.3d 139 (3d Cir. 1999).
  - (d) Job transfer was a tangible employment action, despite fact that no loss of pay occurred, where new position was “objectively worse—such as being less prestigious or less interesting or providing less room for advancement.” Sharp v. Houston, 164 F.3d 923, 933 (5th Cir. 1999).
  - (e) Sexual advances must be “unwelcome.” 29 C.F.R. §1604.11(a).
- (2) Hostile Environment harassment. Sexual harassment that is so objectively offensive as to alter the conditions of employment even though the victim suffers no tangible employment action.

- (a) The conduct must be "severe or pervasive." Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986). Single act versus pattern of conduct: the requirement for repeated exposure will vary inversely with the severity of the offensiveness of the incidents.
- (b) Do not measure the conduct in isolation. Look at all the circumstances, such as frequency of the discriminatory conduct, its severity, whether it is physically threatening or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance. Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993).
- (c) "Simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'" Faragher v. Boca Raton, 524 U.S. 775, 788 (1998).
- (d) The conduct must be unwelcome. Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986).
- (e) Complainant's Participation.
  - (i) Employee's hostile work environment claim was rejected because of her active and often enthusiastic participation in sexual shenanigans. Reed v. Shepard, 939 F.2d 484, 491-92 (7th Cir. 1991).

- (ii) But employees do not forfeit their rights to be free of a sexually offensive workplace merely because they participate to some degree in sexual horseplay, especially when they engage in such behavior defensively. *See Carr v. Allison Gas Turbine Div.*, 32 F.3d 1007 (7th Cir. 1994)(Employee's use of vulgar language is not fatal to her claim because she otherwise made clear that she did not welcome the sexually-directed actions of others).
- (f) Does not require the loss of job benefits or opportunities. *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981).
- (g) Psychological and emotional work environment as a condition of employment. A violation can be shown either by evidence that the misconduct interfered with an employee's work or that the environment could "reasonably be perceived and is perceived as hostile or abusive." *Harris v. Forklift Systems, Inc.*, 114 S.Ct. 367 (1993).
- (h) "Reasonable person" and "reasonable victim" test. Objective/subjective elements. *Harris v. Forklift Systems Inc.*, 114 S.Ct. 367 (1993); *Rabidue v. Osceola Refining Co.*, 805 F.2d 611 (6th Cir. 1986).  
A "sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so." *Farragher v. Boca Raton*, 524 U.S. 775 (1998).
- (i) Need not necessarily be directed at complainant. Evidence of harassment directed at employees other than the plaintiff is relevant to show a hostile work environment. *Hall v. Gus Construction Co., Inc.*, 842 F.2d 1010 (8th Cir. 1988); *Broderick v. Ruder*, 685 F. Supp. 1269 (D.D.C. 1988).

- (j) The harassing official need not be of the opposite sex as the complainant. EEOC v. Hacienda Hotel, 881 F.2d 1504 (9th Cir. 1989), Oncale v. Sundowner Offshore Services, 118 S. Ct. 998 (1998).

5. Types of acts encompassed.

- a. Visual (leering and ogling);
- b. Verbal (derogatory remarks, innuendoes, and jokes);
- c. Physical (pinching, fondling, and rape).

6. Agency liability.

a. Sexual Harassment by Supervisor.

- (1) Tangible Employment Action Case. If the harassment is by the employee's supervisor and results in a tangible employment action, the agency is strictly, or automatically, liable under Title VII. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998); Faragher v. Boca Raton, 524 U.S. 775 (1998).
- (2) Hostile Environment Case. If the harassment is by the employee's supervisor, does *not* result in a tangible employment action, but is so offensive as to alter the employee's conditions of employment, the agency is liable under Title VII *unless*:
  - (a) The agency shows it exercised reasonable care to prevent or correct promptly any sexually harassing behavior, and

- (b) The agency shows the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the agency or to avoid harm otherwise. Ellerth, 118 S.Ct. at 2270.

Note: This 2-prong test is an affirmative defense subject to proof by a preponderance of evidence.

- b. Sexual Harassment by Non-Supervisor (Co-Worker). If the harassment is by the employee's co-worker, the agency is only liable if the agency knew or should have known of the harassing conduct and failed to take prompt and effective corrective action.
  - c. A published procedure for handling sexual harassment complaints, disseminated to the workforce, and suitable to the employment circumstances may be sufficient to show that the agency exercised reasonable care to prevent and promptly correct sexually harassing behavior. Faragher v. City of Boca Raton, 118 S.Ct. 2275 (1998).
7. Disciplinary actions. Civilian employees may be subject to administrative discipline for engaging in sexual harassment under agency regulations prohibiting sexual harassment. King v. Hillen, 21 F.3d 1572 (Fed. Cir. 1994); Hillen v. Dep't of Army, 66 M.S.P.R. 68 (1994); Holland v. Dep't of Air Force, 31 F.3d 1118 (Fed. Cir. 1994); Kirk v. Dep't of Navy, 58 M.S.P.R. 663 (1993).
- a. No requirement for victims to file EEO complaints. A victim may or may not seek redress, but the agency's right to discipline employees who harass or discriminate is not dependent on employee's action.
  - b. Supervisors can be held to higher standard than coworkers. Pierce v. Commonwealth Life Insurance Co., 40 F.3d 796 (6th Cir. 1994).

- c. Charge as misconduct: violation of AR 600-20. Agency need only show an adverse effect on the efficiency of the service. Standard misconduct action under 5 U.S.C. chapter 75. In *Kirk v. Dept. of Navy*, 58 M.S.P.R. 663, (1993) the MSPB made it clear that an agency which charges a harasser with violating its policy need only address that policy and need not prove a Title VII violation or 29 CFR violation.
- d. Removal is appropriate penalty based on single incident of sexual harassment involving physical contact. Evidence showed the employee a postal supervisor sexually harassed another postal supervisor, including proof that employee left voice mail message for other supervisor stating, "Girl, the sound of your voice makes my thing throb and my toes quiver," he attempted to hug and kiss her after she repeatedly warned him not to, and then he ignored those warnings and hit her on the buttocks. *Payne v. USPS*, 74 M.S.P.R. 419 (1997).

## **V. PROCESSING EEO COMPLAINTS.**

### **A. Administrative Complaint Procedures--Nonmixed Cases.**

#### **1. Complaint process.**

##### **a. Informal stage: Employee contacts EEO Counselor.**

- (1) Timing--within 45 days of matter of which complained. 29 C.F.R. § 1614.105(a); *Zografov v. VA Medical Center*, 779 F.2d 967 (4th Cir. 1985); *Boyd v. U.S. Postal Serv.*, 752 F.2d 410 (9th Cir. 1985).

##### **(a) Commencement of 45-day period.**

###### **(i) Personnel action--effective date of action.**

###### **(ii) Event not constituting a personnel action--date individual knew or reasonably should have known of discriminatory event.**



- (b) Tolling of 45-day period. 29 C.F.R. § 1614.105(a)(2). The agency or the Commission shall extend the 45-day time limit when
    - (i) The individual shows that he or she was not notified of the time limits and was not otherwise aware of them;
    - (ii) That he or she did not know and reasonably should not have known that the discriminatory matter or personnel action occurred;
    - (iii) That despite due diligence he or she was prevented by circumstances beyond his or her control from contacting the counselor within the time limits, or for other reasons considered sufficient by the agency or the Commission;
  - (c) Posting requirements. 29 C.F.R. § 1614.102(b)(7).
  - (d) Waiver of time limit. *Oaxaca v. Roscoe*, 641 F.2d 386 (5th Cir. 1981).
- b. Counselor actions. 29 C.F.R. § 1614.105(b)(1).
- (1) Initial interview. At the initial counseling session, counselors must advise individuals in writing of their rights and responsibilities, including
    - (a) The right to request a hearing after an investigation by the agency;
    - (b) Election rights pursuant to §§ 1614.301 and 1614.302;
    - (c) The right to file a notice of intent to sue pursuant to §1614.201 (a) and

- (d) A lawsuit under the ADEA instead of an administrative complaint of age discrimination under this part.
  - (e) The duty to mitigate damages, administrative and court time frames, and that only the matter(s) raised in precomplaint counseling (or issues like or related to issues raised in pre-complaint counseling) may be alleged in a subsequent complaint filed with the agency.
  - (f) Counselors must also advise individuals of their duty to keep the agency and Commission informed of their current address and to serve copies of appeal papers on the agency.
  - (g) Gather facts from complainant.
  - (h) Identify primary agency witness (PAW), if any.
- (2) Counselors shall advise aggrieved persons that, they may choose between participation in an alternative dispute resolution (ADR) program and the counseling activities provided.
- (a) Where the aggrieved person chooses to participate in ADR, the pre-complaint processing period shall be 90 days.
  - (b) Counselor inquiry, including interview with PAW.
  - (c) Final interview. §1614.105(d). If the complainant chooses not to take part in ADR, he shall be given final notice of his right to file a formal discrimination complaint. The notice shall inform the complainant of the right to file a discrimination complaint within 15 days of receipt of the notice, of the appropriate official with whom to file a complaint and of the complainant's duty to assure

that the agency is informed immediately if the complainant retains counsel or a representative.

- (i) Time--within 30 days of contact. This period may be extended for up to an additional 60 days if both the employee and the agency agree. In addition, the 30-day period would be automatically extended to 90 days if the complainant participates in ADR.

- (3) Final report. Counselor must submit a written report within 15 days to the agency office that has been designated to accept complaints and the aggrieved person concerning the issues discussed and actions taken during counseling. 29 C.F.R. § 1614.105(c).

- (a) Identity of complainant. 29 C.F.R. § 1614.105(g). The counselor shall not reveal the identity of an aggrieved person who consulted the counselor, except when authorized to do so by the aggrieved person, or until the agency has received a discrimination complaint from that person involving that same matter.

c. Formal stage.

- (1) Written complaint to EEO Officer. 29 C.F.R. § 1614.106(b). A complaint must contain a signed statement from the person claiming to be aggrieved or that person's attorney. This statement must be sufficiently precise to identify the aggrieved individual and the agency and to describe generally the action(s) or practice(s) that form the basis of the complaint.

- (a) Timing. Within 15 days of final interview with EEO counselor.

- (b) Amendment. 29 C.F.R. § 1614.106(d). A complainant may amend a complaint at any time prior to the conclusion of the investigation to include issues or claims like or related to those raised in the complaint.
- (c) Dismissal of complaint. 29 C.F.R. § 1614.107.
  - (i) Untimely--at either formal or informal stage. 29 C.F.R. § 1614.107(b).
  - (ii) Not within purview of 29 C.F.R. § 1614.103.
  - (iii) Identical complaint.
  - (iv) Not against the proper agency.
  - (v) That is the basis of a pending civil action in a United States District Court.
  - (vi) That is moot or alleges that a proposal to take a personnel action, or other preliminary step to taking a personnel action, is discriminatory.
  - (vii) That alleges dissatisfaction with the processing of a previously filed complaint; or
  - (viii) Where the agency, strictly applying the criteria set forth in Commission decisions, finds that the complaint is part of a clear pattern of misuse of the EEO process for a purpose other than the prevention and elimination of employment discrimination.

- (ix) Appeal of rejection. 29 C.F.R. §1614.107(b). Where the agency believes that some but not all of the claims in a complaint should be dismissed, the agency shall notify the complainant in writing of its determination, the rationale for that determination and that those claims will not be investigated. The agency shall place a copy of the notice in the investigative file. A determination under this paragraph is reviewable by an administrative judge if a hearing is requested on the remainder of the complaint, but is not appealable until final action is taken on the remainder of the complaint.
- (d) After acceptance, the agency may cancel the complaint if employee:
  - (i) Files suit in federal court.
  - (ii) Fails to prosecute.
- (2) Investigation. Series of interviews or a fact-finding conference resulting in a report of investigation (ROI). AR 690-600, para. 2-9. Agencies must complete the investigation within 180 days of the filing of the complaint (with a possible extension of up to 90 days if the employee and agency agree in writing). 29 C.F.R. §§ 1614.106(d) and 1614.108(e). Agencies may use an exchange of letters or memoranda, interrogatories, investigations, fact-finding conferences, or any other fact-finding methods to develop a record. Agencies are encouraged to incorporate alternative dispute resolution (ADR) techniques. 29 C.F.R. § 1614.108(b).
  - (a) Complainant decides on course of action -- within 30 days of receipt of the investigative file. 29 C.F.R. § 1614.108(f).
    - (i) Request a final agency decision from the agency head based on the record.

- (ii) Request a hearing and final decision from EEOC administrative judge.
- d. EEOC hearing. 29 C.F.R. § 1614.109.
  - (1) Prehearing issues.
    - (a) Request for hearing.
    - (b) Dismissals. 29 C.F.R. § 1614.109(b).

Administrative judges may dismiss complaints pursuant to 1614.107, on their own initiative, after notice to the parties, or upon an agency's motion to dismiss a complaint.
    - (c) Offers of Resolution. 29 C.F.R. § 1614.109(c).

Any time after the filing of the written complaint but not later than the date an administrative judge is appointed to conduct a hearing, the agency may make an offer of resolution to a complainant who is represented by an attorney. Any time after the parties have received notice that an administrative judge has been appointed to conduct a hearing, but not later than 30 days prior to the hearing, the agency may make an offer of resolution to the complainant, whether represented by an attorney or not. The agency's offer, to be effective, must include attorney's fees and costs and must specify any non-monetary relief.
    - (d) Discovery. The parties may engage in discovery before the hearing. 29 C.F.R. § 1614.109(d).
    - (e) Hearing procedures.

- (i) Evidence. 29 C.F.R. § 1614.109(e). Rules of evidence shall not be applied strictly, but AJ may exclude irrelevant or repetitious evidence and any person from the hearing for contumacious conduct or misbehavior that obstructs the hearing.
- (ii) Decisions without hearing. 29 C.F.R. § 1614.109(g). The parties may limit the issues for hearing by filing a statement at least 15 days before the hearing showing that there is no genuine dispute as to some or all material facts. The AJ can decide to issue a decision without holding a hearing (if facts are not in genuine dispute). 29 C.F.R. § 1614.109(g)(3).
- (iii) Decisions by administrative judges. 29 C.F.R. § 1614.109(i). Unless the administrative judge makes a written determination that good cause exists for extending the time for issuing a decision, an administrative judge shall issue a decision on the complaint, and shall order appropriate remedies and relief where discrimination is found, within 180 days of receipt by the administrative judge of the complaint file from the agency.
- (f) Final action by agencies. 29 C.F.R. § 1614.110 (a). The agency shall take final action on the complaint by issuing a final order within 40 days of receipt of the hearing file and the administrative judge's decision. The final order shall notify the complainant whether or not the agency will fully implement the decision of the administrative judge and shall contain notice of the complainant's right to appeal to the Equal Employment Opportunity Commission, the right to file a civil action in federal district court, the name of the proper defendant in any such lawsuit and the applicable time limits for appeals and lawsuits. If the final order does not fully implement the decision of the

administrative judge, then the agency shall simultaneously file an appeal.

- (2) Appeal to EEOC. 29 C.F.R. § 1614.401. An appeal of the agency's final action or total dismissal of a complaint must be filed with the EEOC's Office of Federal Operations (OFO) within 30 days of receipt of the final action or dismissal. Agency appeals must be filed within 40 days of receipt of the hearing file and decision.

e. Remedial actions. 29 C.F.R. § 1614.501. See VI, below.

f. Miscellaneous issues in the administrative complaint process. 29 C.F.R. § 1614.605.

- (1) Representation. Attorney or other.

- (2) Official time. Reasonable time to prepare and attend—normally considered in hours, not days or weeks. Does not allow official time for witnesses to prepare, but allows for official time when their presence is authorized or required by Commission or agency officials in connection with a complaint.

B. Administrative Complaint Procedures--Mixed Cases.

1. Initiating the process--Three possible options.

- a. Negotiated grievance procedure. 29 C.F.R. § 1614.301(a). When a person is covered by a collective bargaining agreement that permits allegations of discrimination to be raised in a negotiated grievance procedure, a person wishing to file a complaint or a grievance on a matter of alleged employment discrimination must elect to raise the matter under either part 1614 or the negotiated grievance procedure, but not both.
- b. EEOC mixed case complaint. 29 C.F.R. § 1614.302(a)(1). (EEO complaint process minus hearing before EEOC AJ and appeal to



EEOC). A mixed case complaint is a complaint of employment discrimination filed with a Federal agency based on race, color, religion, sex, national origin, age or handicap related to or stemming from an action that can be appealed to the Merit Systems Protection Board (MSPB). The complaint may contain only an allegation of employment discrimination or it may contain additional allegations that the MSPB has jurisdiction to address. 29 C.F.R. § 1614.302(a)(1)

- c. MSPB mixed case appeal. 29 C.F.R. § 1614.302(a)(2). A mixed case appeal is an appeal filed with the MSPB that alleges that an appealable agency action was effected, in whole or in part, because of discrimination on the basis of race, color, religion, sex, national origin, handicap or age.

- 2. Electing the option. An aggrieved person may initially file a mixed case complaint with an agency pursuant to this part or an appeal on the same matter with the MSPB pursuant to 5 CFR 1201.151, but not both. An agency shall inform every employee who is the subject of an action that is appealable to the MSPB and who has either orally or in writing raised the issue of discrimination during the processing of the action of the right to file either a mixed case complaint with the agency or to file a mixed case appeal with the MSPB.

- a. Complaint process. When a complainant elects to file a mixed case complaint, rather than with the MSPB, the procedures set forth above for nonmixed case processing shall govern the processing of the mixed case complaint with the following exceptions:

- (1) At the time the agency advises a complainant of the acceptance of a mixed case complaint, it shall also advise the complainant that:
  - (a) If a final decision is not issued within 120 days of the date of filing of the mixed case complaint, the complainant may appeal the matter to the MSPB at any time thereafter as specified at 5 CFR § 1201.154(b)(2) or may file a civil action as specified at § 1614.310(g), but not both; and

- (b) If the complainant is dissatisfied with the agency's final decision on the mixed case complaint, the complainant may appeal the matter to the MSPB (not EEOC) within 30 days of receipt of the agency's final decision;
  - (2) Upon completion of the investigation, the notice provided the complainant in accordance with § 1614.108(f) will advise the complainant that a final decision will be issued within 45 days without a hearing; and
  - (3) At the time that the agency issues its final decision on a mixed case complaint, the agency shall advise the complainant of the right to appeal the matter to the MSPB (not EEOC) within 30 days of receipt and of the right to file a civil action as provided at § 1614.310(a).
- b. Other differences in procedures for mixed cases and nonmixed cases.
  - (1) Hearing in EEO complaint process.
  - (2) Appeal to EEOC upon completion of MSPB process.
  - (3) Special Panel if MSPB and EEOC decisions clash.
- C. Administrative Complaint Procedures--Class Complaints.
  - 1. Requirement to exhaust administrative class procedures as a prerequisite to maintaining judicial class action.
  - 2. Significant difference in procedures for class complaints.
    - a. Class agent.
    - b. Heightened pleading requirement in formal complaint.

- c. Preliminary role of administrative judge in determining propriety of class processing.
- d. Additional requirements for acceptance of class complaint.
- e. Notice to class members and opting out.
- f. Individual relief upon finding of class-wide discrimination.

## VI. REMEDIES IN EEO ACTIONS

- A. Nondiscriminatory placement, promotion, etc. “Make whole” relief.
- B. Back pay. Reduced by interim earnings (duty to mitigate damages). Employee must be ready, willing, and able to work to be entitled to back pay. *Miller v. Marsh*, 766 F.2d 490 (11th Cir. 1985). Back pay liability under Title VII or the Rehabilitation Act is limited to two years prior to the date the discrimination complaint was filed.
- C. Front Pay. *Shore v. Federal Express Corp.*, 42 F.3d 373 (6th Cir. 1994). As general rule, reinstatement into an appropriate position is preferred to award of front pay. Three circumstances where front pay may be awarded in lieu of reinstatement: (1) where no position is available, (2) where subsequent working relationship would be antagonistic, or (3) where employer has record of long-term resistance to anti-discrimination efforts. *Finlay v. Postmaster General*, 01942985 (1997).
  - 1. The Supreme Court recently settled a split among the Circuits and ruled that front pay is not an element of compensatory damages under Section 1981a of the Civil Rights Act of 1991. Thus, front pay is not subject to the \$300,000 damages cap (see para. G.1, below). *Pollard v. DuPont*, 532 U.S. 843 (2001). Note that the time between judgment and reinstatement is considered front pay. Front pay may also be awarded when conditions prevent reinstatement.
- D. Expunge from the agency’s records any adverse materials relating to the discriminatory employment practice.

- E. Full opportunity to participate in the employee benefit denied (e.g., training, preferential work assignments, overtime scheduling).
- F. Fees and costs. Attorney's fees or costs shall apply to allegations of discrimination prohibited by Title VII and the Rehabilitation Act. Attorney's fees are normally payable only for work beginning at formal complaint stage. However, attorney's fees will be payable for work performed during *pre-complaint* process where the Commission affirms an administrative judge's finding that an agency has not implemented. 29 C.F.R. § 1614.501(e).
- G. Additional relief under the Civil Rights Act of 1991.
  - 1. Compensatory Damages. Limited to \$300,000 above other relief (cap does not include back pay, front pay, attorney fees, or lost benefits). Assessed by EEOC. *West v. Gibson*, 527 U.S. 212, 119 S.Ct. 1906 (1999)(EEOC has authority to require federal agencies to pay compensatory damages when they discriminate).
    - a. Not payable in ADEA (age discrimination) cases. The 1991 Civil Rights Act amended only Title VII and the Rehabilitation Act in terms of damages.
    - b. Not payable in Rehabilitation Act cases when agency made *good faith efforts* to reasonably accommodate.
    - c. Note: The agency bears the cost of any compensatory damages paid in the EEO administrative process. If civil suit is filed and judgment is against the agency, the Judgment Fund pays. Pending legislation may change this. The "No Fear" bill (H.R. 169) proposes to make Federal agencies more accountable for violations of anti-discrimination laws by requiring agencies to reimburse the Judgment Fund.
  - 2. Jury trials. In any case where the plaintiff seeks compensatory damages and takes case to Federal District Court.
  - 3. Prejudgment interest.

4. Expert fees.

H. Injunctive Relief.

1. EEO Recovery Limited by After-Acquired Evidence of Misconduct.  
McKennon v. Nashville Banner Publishing Co., 115 S. Ct. 879 (1995).

## **VII. CONCLUSION.**

# CHAPTER U

## JAABC

### Introduction to the Law of Federal Employment

#### Federal Civil Service

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## Outline of Instruction

### **I. INTRODUCTION.**

### **II. REFERENCES.**

#### **A. Statutes.**

1. Title 5, United States Code, Chapters 11, 12, 21, 23, 33, 51, 55, 75, and 77 (Civil Service Reform Act of 1978, codified as amended at 5 U.S.C. §§ 1101-8913).
2. Title 29, United States Code, §§ 791 and 794a (Rehabilitation Act of 1973).
  - a. Note: In 1992, the Rehabilitation Act (29 U.S.C. § 791(g)) was amended to make standards that apply under Title I of the Americans with Disabilities Act (42 U.S.C. § 12111 *et seq.*) and the provisions of §§ 501, 504, and 510 of the Americans with Disabilities Act (42 U.S.C. §§ 12201-204, 12210) applicable in Rehabilitation Act cases to determine whether non-affirmative action employment discrimination occurred. These provisions primarily relate to discrimination based on disability and reasonable accommodation.
3. Title 29, United States Code, §§ 633a (Age Discrimination in Employment Act).
4. Title 42, United States Code, §§ 2000e to 2000e-17 (Civil Rights Act of 1964, as amended).
5. Title 42, United States Code, §§ 1981, 1988, and 2000e-2 (Civil Rights Act of 1991).
6. Title 5, United States Code, §§ 2302, 1211-1219 (Whistleblower Protection Act of 1989, as amended).

#### **B. Government-Wide Regulations and Guidance.**

1. Office of Personnel Management (OPM). Title 5, Code of Federal Regulations, Chapter I.
2. Merit Systems Protection Board (MSPB). Title 5, Code of Federal Regulations, Chapter II.
3. Office of Special Counsel (OSC). Title 5, Code of Federal Regulations, Chapter VIII.
4. Equal Employment Opportunity Commission (EEOC). Title 29, Code of Federal Regulations, Chapter XIV (Part 1614 applies to federal sector equal employment opportunity complaints processing).

C. Military Department Regulations.

1. Department of Defense.
  - a. DoD Directive 1400.25-M, DOD Civilian Personnel Manual System (DODCPMS). This Directive updates policy and assigns responsibilities for civilian personnel management of the DoD civilian workforce.  
<http://www.cpms.osd.mil/cpm/docs/directive.pdf>
  - b. DoD Civilian Personnel Manual.  
<http://www.cpms.osd.mil/cpm/cpm.html>
2. Department of the Army. Army Regulation 690-xxx series.  
<http://www.usapa.army.mil/cpol/>

D. Other Sources.

1. Administrative and Civil Law Deskbook, The Law of Federal Employment, JA 210 (September 2000).
2. U.S. Merit Systems Protection Board Reporter (M.S.P.R.), West Publishing Co., St. Paul, MN. MSPB decisions (from 1994 to present) are also available at the MSPB website:  
<http://www.mspb.gov/decisions/decisions.html>



3. Federal sector decisions of the Equal Employment Opportunity Commission (EEOC) from July, 2000 to present are available at: <http://www.eeoc.gov/federal/decisions.html>
4. Representing the Agency Before the U.S. Merit Systems Protection Board: A Handbook on MSPB Practice and Procedure Harold J. Ashner, Dewey Publications, Inc., P.O. Box 663, Arlington, VA 22216 Tel.: (703) 524-1355. Email: [dewey@deweypub.com](mailto:dewey@deweypub.com). Web: [www.deweypub.com](http://www.deweypub.com).
5. A Guide to Merit Systems Protection Board Law & Practice, Peter B. Broida, Dewey Publications Inc., P.O. Box 663, Arlington, VA 22216; Tel.: (703) 524-1355. Updated annually.
6. Representing Agencies and Complainants Before the EEOC, Hadley, Laws, and Riley, Dewey Publications, Inc., P.O. Box 663, Arlington, VA 22216; Tel.: (703) 524-1355. [Book's focus is hearing practice].
7. A Guide to Federal Sector Equal Employment Law & Practice, Ernest C. Hadley, Dewey Publications Inc., P.O. Box 663, Arlington, VA 22216; Tel.: (703) 524-1355. Updated annually. [Book's focus is substantive law].
8. Internet Cites:
  - a. OPM: [www.opm.gov](http://www.opm.gov)
  - b. MSPB: [www.mspb.gov](http://www.mspb.gov)
  - c. EEOC: [www.eeoc.gov](http://www.eeoc.gov)
  - d. DoD Civilian Personnel Management Service: <http://www.cpms.osd.mil>
  - e. DoD Directives/Instructions: <http://www.dtic.mil/whs/directives/>
  - f. Army Civilian Personnel Office: [www.cpol.army.mil](http://www.cpol.army.mil)

- g. List of personnel management related links:  
[http://www.cpms.osd.mil/vip/p\\_links.htm](http://www.cpms.osd.mil/vip/p_links.htm)
- h. Army JAGCNET: <http://www.jagcnet.army.mil/> . Email them regarding access to the restricted Labor/Employment law forum for Labor Counselors. [email: laawsxxi@jagc-smtp.army.mil]
- i. Air Force FLITE: <https://aflsa.jag.af.mil/>. Email them regarding access to excellent employment law materials, primers, brief banks, etc. [flite@jag.af.mil]

### **III. DEVELOPMENT AND STRUCTURE OF THE FEDERAL CIVIL SERVICE SYSTEM.**

#### **A. Evolution From Spoils System.**

1. Pendleton Act, 22 Stat. 403 (1883).
2. Lloyd-LaFollette Act, 37 Stat. 555 (1912).
3. Veterans' Preference Act, 58 Stat. 387 (1944).
4. Civil Service Reform Act of 1978, Pub. L. No. 95-454 (1978).
5. Whistleblower Protection Act of 1989, 5 U.S.C. §§ 1211 (establishing Office of Special Counsel as independent agency).
6. Civil Service Due Process Amendments of 1990, Pub. L. No. 101-376 (1990). Amends 5 U.S.C. § 7511 to extend procedural protections to certain excepted service employees who have completed 2 years of continuous service. Includes the right to appeal adverse personnel actions to the MSPB.

#### **B. Key Players in the Civil Service System (Government-Wide).**

1. The President and Congress. U.S. Const. art. II, § 2, cl. 2: The President . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein provided for and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.
2. Office of Personnel Management (OPM). 5 U.S.C. §§ 1101-1105.
  - a. Source: A successor agency to the Civil Service Commission created under the authority of the Civil Service Reform Act of 1978.
  - b. Function: The principal function of the OPM is to set policy and provide guidance to other federal agencies in matters regarding federal employees.
3. Merit Systems Protection Board (MSPB). 5 U.S.C. §§ 1201-1206.
  - a. Source: Three-member bipartisan board created under the authority of the Civil Service Reform Act of 1978.
  - b. Functions:
    - (1) Hear and adjudicate cases within its jurisdiction.
    - (2) Conduct special studies.
    - (3) Review OPM rules and regulations to determine validity.
4. Office of Special Counsel (OSC). 5 U.S.C. §§ 1211-1219.
  - a. Sources: The Civil Service Reform Act of 1978; Whistleblower Protection Act of 1989; Hatch Act.

- b. Functions: OSC receives, investigates, and prosecutes allegations of prohibited personnel practices (PPPs), with emphasis on protecting federal government whistleblowers.
  - (1) OSC seeks corrective action remedies (such as back pay and reinstatement), by negotiation or from the Merit Systems Protection Board (MSPB), for injuries suffered by whistleblowers and other complainants. OSC is also authorized to file complaints at the MSPB to seek disciplinary action against individuals who commit PPPs.
  - (2) OSC promotes compliance by government employees with legal restrictions on political activity by providing advisory opinions on, and enforcing, the Hatch Act. The Hatch Act Unit also enforces compliance with the Act. Depending on the severity of the violation, OSC will either issue a warning letter to the employee, or prosecute a violation before the MSPB.

5. Equal Employment Opportunity Commission (EEOC).

- a. Source: The EEOC was established by Title VII of the Civil Rights Act of 1964; however, the Act did not originally apply to the federal sector. The Equal Employment Opportunity Act of 1972 made Title VII applicable to the federal workplace. Responsibility for federal sector EEO was vested in the Civil Service Commission. Presidential Reorganization Plan No. 1 of 1978, 43 Fed. Reg. 19,807 (1978) transferred enforcement power for federal sector EEO complaints from the Civil Service Commission to the EEOC.
- b. Functions: The EEOC coordinates all federal equal employment opportunity regulations, practices, and policies. It interprets employment discrimination laws, monitors the federal sector employment discrimination program, and sponsors outreach and technical assistance programs.

6. Federal Labor Relations Authority (FLRA).

- a. Source: The FLRA was created by the Civil Service Reform Act of 1978 (5 U.S.C. §§ 7104-7105) and is a quasi-judicial body with three full-time members who are appointed for five-year terms by the President.
- b. Functions: The FLRA establishes policies and guidance relating to federal sector labor-management relations and resolves disputes and ensures compliance with Title VII of the Civil Service Reform Act of 1978, known as the Federal Service Labor-Management Relations Statute. It adjudicates disputes arising under the Statute, deciding cases concerning the negotiability of collective bargaining agreement proposals, appeals concerning unfair labor practices and representation petitions, and exceptions to grievance arbitration awards.

C. Agency Players in the Civil Service System.

- 1. Department of Defense Civilian Personnel Management Service (CPMS).  
Mission: Develops and manages human resources programs and systems for the Department of Defense (DoD); develops and recommends policy and provides guidance on all aspects of civilian personnel management; and advises all levels of management employees in DoD regarding human resources issues.
- 2. Installation Level Players.
  - a. Labor Counselor.
  - b. The Civilian Personnel Office (CPO).
    - (1) Traditional structure.
    - (2) DoD worldwide regionalization of CPOs.

- (i) Army: Civilian Personnel Operations Center Management Agency (CPOCMA). <http://www.cpocma.army.mil/> . Seven CONUS Civilian Personnel Operations Centers (CPOCs), but downsizing to five. Three overseas CPOCs (Alaska, Korea, Germany).
- (ii) Defense Finance & Accounting Service (DFAS). Indianapolis, IN.
- (iii) Defense Logistics Agency (DLA). Columbus, OH.
- (iv) Washington Headquarters Service (DoD NCR). Alexandria, VA.

(3) Civilian Personnel Advisory Centers (CPACs).

c. Equal Employment Opportunity Officer.

#### IV. CLASSIFICATIONS OF FEDERAL EMPLOYEES.

- A. Becoming a Civil Service Employee--Statutory Requirements: Appointment in the civil service by one of several designated officials; performance of a Federal function; and supervision in the performance of duties by a federal official. 5 U.S.C. § 2105(a).
  - 1. Appointment. Most heavily litigated of the 3 prongs, frequently in the area of eligibility for civil service retirement benefits. *See Wolcott v. U.S.*, 43 Fed. Cl. 581 (1999)(Employees of federal employer not entitled to severance pay because they were specifically appointed as trust fund employees and not as civil service employees); *Bevans v. Office of Personnel Management*, 900 F.2d 1558 (Fed. Cir. 1990)(Petitioner's deceased husband's survivorship benefits did not include the time he spent as an employee of a proprietary corporation of the CIA); *Horner v. Acosta*, 803 F.2d 687 (Fed. Cir. 1986); *Watts v. OPM*, 814 F.2d 1576 (Fed. Cir. 1987).

2. Performing federal function. *McCarley v. MSPB*, 757 F.2d 278 (Fed. Cir. 1985), *overruled on other grounds by Hagmeyer v. Department of Treasury*, 852 F.2d 531 (Fed. Cir. 1988)(MSPB properly dismissed McCarley's appeal because although appointed, McCarley had not yet started work and therefore had not performed a federal function nor been supervised).
3. Supervision. *Horstmann v. OPM*, No. 98-3187, 1998 U.S. App. LEXIS 26223 (Fed. Cir. Oct. 14, 1998)(Court declined to award federal employee status to NASA contract employee who alleged he was closely supervised by NASA civil servants).
4. Nonappropriated fund (NAF) employees are not deemed employees for the purpose of laws administered by the OPM, with exceptions. *See* 5 U.S.C. § 2105(c)(1).

B. Employees--Classified by Type of Service to Which Appointed

1. Competitive service. 5 U.S.C. § 2102. More than 80% of Federal employees are employed in the competitive service. Testable-type skills. Applicants compete for the job and are evaluated according to objective standards. Their "examination" may be in form of an evaluation of experience provided on an application, a written test, a review of work samples, or all of the above.
2. Excepted service. 5 U.S.C. § 2103. Over 19% of Federal employees are excepted service.
  - a. Statutory definition: "[T]hose civil service positions which are not in the competitive service or the Senior Executive Service." This type of appointment is made for positions excepted from the competitive service system by law, executive order, or with OPM approval.
  - b. Excepted Service Schedules.
    - (1) Schedule A: Positions for which it is not practicable to apply qualification standards and requirements used in the competitive service system and which are not of a confidential or policy determining nature. Ex: lawyers, chaplains, faculty members at service academies.

- (2) Schedule B: Positions for which it is not practicable to hold competitive examinations and which are not of a confidential or policy determining nature. Appointees must meet OPM's basic qualification standards for the job. Ex: Dep't of Agriculture research associates, trainees in cooperative education programs.
  - (3) Schedule C: Key positions which are policy determining or which involve close personal relationship between incumbent and agency head or key officials. No examinations. Most political appointees below subcabinet level are appointed under Schedule C.
- 3. Senior Executive Service (SES). 5 U.S.C. §§ 2101a and 3132(a)(2). Less than one half of one percent of employees are SES. Established by the Civil Service Reform Act of 1978 as a separate personnel system for employees who administer at the top levels of Federal government. Managerial, supervisory, and policy positions classifiable above GS-15. SES appointments can be career, noncareer, limited term, or limited emergency. Veterans' preference does not apply.
  - a. Career. Initial career appointments to the Senior Executive Service must be based on merit competition. Agency Executive Resources Boards conduct the merit staffing process leading to initial career appointment. Vacancies must be advertised Government-wide. OPM administers interagency Qualification Review Boards who certify the executive qualifications of agency selectees before their initial SES career appointment. A one-year probationary period follows initial career appointment. At least 70% of SES positions Government-wide must be filled by individuals with 5 years or more of current, continuous service immediately before initial SES appointment to assure experience and continuity. Serve one-year probationary period.
  - b. Non-career and limited appointments are made without competition. The agency head or his/her designee approves the candidate's qualifications. Law limits number of noncareer SESs to 10% of total SES positions.
  - c. Pay. No grades, but six pay levels. Agency sets pay at one of authorized levels. Pay may be reduced only for performance or disciplinary reasons. Career SESs get 15-days advance notice of pay reduction.



C. Employees--Classified by Tenure Status.

1. Requirement for probationary period. 5 U.S.C. §§ 3321; 5 C.F.R. §§ 315.801-315.806.
  - a. Purpose--an extension of the hiring process; to determine the employee's fitness and qualifications for continued employment. 5 C.F.R. § 315.803. U.S. Dep't. of Justice v. FLRA, 709 F.2d 724 (D.C. Cir. 1983).
  - b. Competitive service--one year probationary period. 5 C.F.R. § 315.802.
    - (1) When probationary period required. 5 CFR § 315.801.
      - (a) When employee is given a career or career-conditional appointment and
        - (i) Was appointed from competitive list of eligibles;
        - (ii) Was reinstated, unless employee completed probationary period or served with competitive status under an appointment which did not require probationary period; or
        - (iii) Was transferred, promoted, demoted, or reassigned before completing the probationary period.
      - (b) Employees reinstated from Reemployment Priority List to position in same agency and same commuting area do not have to serve new probationary period, unless probationary period was not completed in last job. 5 CFR § 315.801.

- (c) Prior federal civil service (including nonappropriated fund service) *may* count toward completion of probation (see factors at 5 CFR § 315.802(b)).
  - (d) Requirement of new probationary period upon change in positions if new appointment or initial probationary period not satisfied. 5 C.F.R. § 315.801(b); *Park v. DHHS* 78 M.S.P.R. 527 (1998); *Todd v. MSPB*, 50 F.3d 21 (Fed. Cir. 1995) (Table); *Grigsby v. Dep't of Commerce*, 729 F.2d 772 (Fed. Cir. 1984); *Francis v. Dep't of Navy*, 53 M.S.P.R. 545 (1992).
  - (e) Temporary or intermittent appointments do not count toward satisfaction of probationary period. *Forest v. MSPB*, 47 F.3d 409 (Fed. Cir. 1995); *Rosete v. OPM*, 48 F.3d 514 (Fed. Cir. 1995).
- c. Excepted service.
  - (1) Preference eligible excepted service employees must serve a one-year probationary equivalent time period. 5 USC § 7511.
  - (2) Nonpreference eligible excepted service employees must serve two years of "current continuous service . . . under other than a temporary appointment . . ." *Forest v. Merit Systems Protection Bd.*, 47 F.3d 409 (Fed. Cir. 1995).
- d. Senior Executive Service. Career SESs serve probationary period of one year. 5 CFR § 317.503.
- e. Probationary period for new supervisors--one year. 5 U.S.C. § 3321; 5 C.F.R. §§ 315.901-315.908; AR 690-300, ch. 315, subch. 9. *DeCleene v. Education*, 71 M.S.P.R. 651 (1996).
  - (1) Employees assigned or promoted to supervisory positions who do not satisfactorily complete probationary period shall be returned to a position of no lower grade and pay than the last position. 5 USC § 3221(b).

2. Significance of probationary status. Probationary employees who do not meet acceptable standards may be removed from civil service without the formal procedures (due process) that apply to non-probationers. 5 C.F.R. § 315.804 (requiring only notice of effective date and stated reason for termination of probationer); *Toyens v. Dep't of Justice*, 58 M.S.P.R. 634 (1993); *Stanley v. Dep't of Justice*, 58 M.S.P.R. 354 (1993); *Pierce v. GPO*, 70 F.3d 106 (1996).
  - a. Pre-employment conditions. If terminating probationary employee for conditions arising before appointment, employee is entitled to (1) advance written notice of reasons for the action; (2) reasonable time to file written answer; and (3) written notice of decision, reason for the decision, and right to appeal to MSPB. 5 CFR § 315.805.
3. Probationary employees' limited MSPB appeal rights. When separated, a competitive service probationary employee has limited appeal rights to the MSPB. 5 C.F.R. § 315.804-06. The employee has the right to a jurisdictional hearing to determine whether the termination was based upon partisan political reasons or marital status or that his termination was based upon pre-appointment reasons and was procedurally incorrect. *Park v. DHHS* 78 M.S.P.R. 527 (1998); *Rhone v. Dept Treasury*, 66 M.S.P.R. 257 (1995).
  - a. No entitlement to have the MSPB review the correctness of the agency decision. *Gaxiola v. Dep't. Of Air Force*, 6 M.S.P.R. 515 (1981); *Munson v. Dep't. of Justice*, 55 M.S.P.R. 246 (1992); *Keller v. Dept of Navy*, 69 M.S.P.R. 183 (1996).
4. Negotiated grievance procedure concerning separation of probationary employee is precluded by 5 USC § 3221. *Dep't. of Justice, Immigration and Naturalization Serv. v. FLRA*, 709 F.2d 724 (D.C. Cir. 1983); *Nellis Air Force Base & AFGC Local 1199*, 46 FLRA 1323 (1993).
5. Employee tenure upon appointment: Career-conditional. 5 C.F.R. § 315.301.
  - a. Acquisition of career status. After serving three continuous years under a career-conditional appointment, the employee will automatically receive a career appointment.

- (1) If employee leaves federal service before acquiring career status (and not return in 30 days), a new three-year period must be completed.
    - (2) Employees with veterans' preference retain lifetime reinstatement eligibility.
  - b. Significance of career status: Noncompetitive promotion and placement. A career appointment confers permanent status with greatest possible job protection. Career employees have permanent reinstatement eligibility (if leave federal service, they may be considered for reemployment without having to take another competitive civil service examination). 5 C.F.R. § 212.301.
6. Due Process in Performance-Based or Misconduct-Based Adverse Actions.
- a. Much due process:
    - (1) Nonprobationary competitive service employees.
    - (2) Nonprobationary preference eligible excepted service employees.
    - (3) Most nonprobationary nonpreference eligible excepted service employees with more than two years of current continuous service.
  - b. Little due process:
    - (1) Probationary competitive service and probationary, preference eligible excepted service employees.
    - (2) Nonpreference eligible excepted service employees with less than two years of current continuous service.

- (3) Temporary or term appointees; some excepted service employees not subject to Due Process Amendments of 1990. *Todd v. MSPB*, 55 F.3d 1574 (Fed. Cir. 1995) (Employees of DODDS schools do not receive appeal rights); *Monser v. Dep't of Army*, 67 M.S.P.R. 477 (1995) (Civilian Intelligence Personnel Management System [CIPMS] employees do not receive appeal rights).

- (a) Note: The Civil Service Due Process Amendments of 1990, Pub. L. No. 101-376 (1990), amended 5 U.S.C. § 7511 to extend procedural protections to certain excepted service employees who have completed 2 years of continuous service. Includes the right to appeal adverse personnel actions to the MSPB.

- c. Senior Executive Service. See 5 CRF § 317.302. If career SES is removed during probationary period, there are no MSPB appeal rights. 5 CFR § 359.407; 5 USC § 7701. Nonprobationary career SES may have fallback rights to a GS-15 position unless removal is for misconduct.

D. Employees--Classified by Eligibility for Veterans' Preference. 5 U.S.C. § 2108.

1. General Principles.

- a. Goal is not to place a veteran in every vacant federal job (would be incompatible with merit principles).
- b. Preference applies in hiring from civil service examinations conducted by the Office of Personnel Management (OPM) and agencies under delegated examining authority, for most excepted service jobs including Veterans' Readjustment Appointments (VRA), and when agencies make temporary, term, and overseas limited appointments.
- c. Veterans' preference does not apply to promotion, reassignment, change to lower grade, transfer or reinstatement.

- d. Veterans' preference does not *require* an agency to use any particular appointment process. Agencies have broad authority under law to hire from any appropriate source of eligibles including special appointing authorities. An agency may consider candidates already in the civil service from an agency-developed merit promotion list or it may reassign a current employee, transfer an employee from another agency, or reinstate a former Federal employee. In addition, agencies are required to give priority to displaced employees before using civil service examinations and similar hiring methods.

2. General Requirements.

- a. Honorable or general discharge is always necessary.
- b. Military *retirees* at rank of major (lieutenant commander) or higher are not eligible for preference unless they are disabled veterans.
- c. National Guard and Reserve action for training purposes does not qualify for veterans' preference.

3. Which veterans get preference?

- a. General rule: Individuals who enter military service after October 14, 1976, will not receive veterans' preference unless they receive a campaign expeditionary medal, or serve in a war declared by Congress, or become disabled during or as a result of military service.
- b. Service on active duty in the armed forces "during, or at the time of, a campaign or expedition for which a campaign badge has been authorized" is not sufficient. Rather, the individual must have served in the campaign or expedition for which a campaign badge was authorized. *Perez v. MSPB*, 85 F.3d 591 (Fed. Cir. 1996); *Rivas v. Postal Serv.* 72 M.S.P.R. 383 (1996).
- c. Those who served during the period from April 28, 1952, through July 1, 1955 receive preference.

- d. Those who served for a period of more than 180 consecutive days after January 31, 1955 and before October 15, 1976 receive preference.
  - e. Anyone who served on active duty during the Gulf War from August 2, 1990, through January 2, 1992 receives preference.
  - f. The Fiscal Year 1998 Defense Authorization Act authorizes servicemembers who participated in Operation Joint Endeavor or Operation Joint Guard in the Republic of Bosnia and Herzegovina and in such other areas in the region as the Secretary of Defense considers appropriate and who were awarded the Armed Forces Expeditionary Medal (AFEM) to claim a 5 point veterans' preference (in hiring).
  - g. Two-year minimum active duty service condition for Gulf War veterans and campaign medal holders entering military service after September 7, 1980 (including El Salvador, Lebanon, Grenada, Panama, Southwest Asia, Somalia, and Haiti). Does not apply for disabled veterans. Reserve and Guard members need not have served two years provided they served the full period when called or ordered to active duty.
4. Derived Preference. In some cases, the unmarried widow, unmarried widower, wife, husband, or mother of a veteran may use veterans' preference.
5. Effects of preference eligibility.
- a. 30-Percent Disabled Veterans. Under the Civil Service Reform Act of 1978, a disabled veteran with compensable service-connected disability of 30% or more who meets the qualification standards may be given a noncompetitive appointment (which may lead to conversion to career or career-conditional employment).
    - (1) Agencies wanting to disqualify or non-select an eligible applicant with 30% veterans' preference on a civil service list of eligibles must first notify OPM and the applicant. Applicant may appeal within 15 days.

- b. 10-point preference. Ten points are added to the earned rating of disabled veterans and veterans awarded the Purple Heart who make a passing grade and were honorably separated.
  - (1) Disabled means a veteran with (1) present service-connected disability; or (2) is receiving compensation, disability retirement benefits, or pension from the military or the VA, or who was awarded the Purple Heart.
- c. 5-point preference. In civil service examinations, 5 points are added to the earned rating of an applicant who makes a passing grade and who was honorably separated from the military.
- d. Hiring. When referral is made from external recruitment sources, such as the OPM Certificates, Veterans Readjustment Appointment, or outside the register authority for temporary appointment, candidates are ranked and referred in veterans' preference order. This order of referral often restricts the supervisor's ability to select. Normally, veterans' preference eligibles listed above nonpreference eligibles on a referral list must be selected before any nonpreference eligibles can be selected.
  - (1) Example: The "Rule of Three" and Veterans Passovers.
    - (a) If the top person on a certificate is a 10-point disabled veteran and the second and third persons are 5-point preference eligibles, the appointing authority may choose any of the three.
    - (b) If the top person on a certificate is a 10-point disabled veteran, the second person is not a preference eligible, and the third person is a 5-point preference eligible, the appointing authority may choose either of the preference eligibles. The appointing authority may not pass over the 10-point disabled veteran to select the nonpreference eligible unless an objection has been sustained.



- e. Veterans with career tenure. Veterans with career civil service tenure have job retention rights over all other federal workers in the same competitive level. Veterans with career-conditional tenure do not have job retention rights over non-veterans with career tenure.
    - f. Reduction-in-force (RIF) actions. 5 U.S.C. § 3502.
    - g. Actions for unacceptable performance and misconduct. 5 U.S.C. §§ 4303(e), 7511(a)(1)(B), and 7513(d). Veterans in the excepted service who have completed one year of current continuous service are entitled to MSPB appeal of adverse actions. (Non-veterans must serve two years before gaining same MSPB appeal rights).
  - 6. Constitutionality of preference. *Frederick v. United States*, 507 F.2d 1264 (Ct. Cl. 1974). *See also* *Massachusetts v. Feeney*, 442 U.S. 256 (1979).
  - 7. For more information, see OPM's Vet Guide at [www.opm.gov/veterans/html/vetguide.htm](http://www.opm.gov/veterans/html/vetguide.htm).
- E. Classification of Positions by Method of Payment. 5 U.S.C. Chapters 51-59.
- 1. General schedule employees. 5 U.S.C. Chapters 51 and 53. GS-1 through GS-15. Salaries based on substantially equal pay for substantially equal work within each local pay area. Differences in pay based on differences in work and performance and comparability to the salaries that non-Federal employers pay for work at the same level of difficulty and responsibility.
  - 2. Prevailing rate employees (wage system). 5 U.S.C. §§ 5341-5349. Worker: WG-1 through WG-15. Leader: WL-1 through WL-15. There are 5 steps in each WG and WL grade. Supervisor = WS. Pay system covers trade, craft, labor, and other blue-collar jobs. Pay is based on the prevailing rates in a given local wage area. These are hourly rate employees who receive annual wage adjustments.
  - 3. Senior Executive Service (SES) employees. 5 U.S.C. §§ 5381-5385. ES-1 through ES-6. President sets pay rate. Minimum may not be below 120% of lowest rate for GS-15.

4. Executive Schedule. Levels I-V. Top executive salaries. Members of Cabinet, deputy secretaries, undersecretaries, assistant secretaries, etc.
5. Nonappropriated fund employees. Those employees who are not paid from funds appropriated by Congress. Work in exchanges, clubs, commissaries, etc. Paid from funds derived from sales and services performed. NAF's are not considered employees for the purposes of most laws administered by OPM. DODI 1015.10; AR 215-3.

## **V. EMPLOYEE APPEAL AND GRIEVANCE RIGHTS.**

### **A. Rights Depend On:**

1. Type of action taken,
2. Collective bargaining agreement, and
3. Employee status.

### **B. Without a Collective Bargaining Agreement.**

1. "True" adverse actions and appealable performance based actions -- Appeal to MSPB. 5 U.S.C. §§ 4303, 7513, and 7701.
2. Other actions -- Army Administrative Grievance Procedure. AR 690-700, Ch. 771.

### **C. With a Collective Bargaining Agreement.**

1. "True" adverse actions and appealable performance based actions. 5 U.S.C. §§ 4303, 7121, and 7701. See *Billops v. Dep't of Air Force*, 725 F.2d 1160 (8th Cir. 1984).
  - a. Appeal to MSPB.
  - b. Grievance and arbitration.

2. Other disciplinary actions--Grievance and arbitration. 5 U.S.C. § 7121.
- D. Employee Status. Competitive Service v. Excepted Service -- What significance? Employee rights in performance-based and adverse actions depend, in part, upon employee status.
1. Much Due Process:
    - a. Nonprobationary competitive service employees.
    - b. Nonprobationary-equivalent preference eligible excepted service employees.
    - c. Most nonprobationary-equivalent nonpreference eligible excepted service employees with more than two years of current continuous service.
  2. Little Due Process:
    - a. Probationary competitive service and probationary-equivalent veterans' preference excepted service employees.
    - b. Nonpreference eligible excepted service employees with less than two years of current continuous service.

## **VI. EMPLOYEE PERFORMANCE.**

- A. Performance Appraisal System. 5 U.S.C. § 4302; 5 C.F.R. Part 430; AR 690-400, Ch. 4302.
- B. Total Army Performance Evaluation System (TAPES). AR 690-400, Ch. 4302.
- C. Actions for Unacceptable Performance. 5 U.S.C. § 4303; 5 C.F.R. Part 432; and AR 690-400, Ch. 432 (Performance-Based Actions).
  1. Counseling.

2. Reassignment.
3. Reduction in grade.
4. Removal.

D. Proof Requirements.

1. Performance appraisal system approved by OPM. *Scillion v. Dep't of Health and Human Services*, 45 M.S.P.R. 521 (1990); *McKenzie v. Dep't of Interior*, 16 M.S.P.R. 397 (1983); *Griffin v. Dep't of Army*, 23 M.S.P.R. 657 (1984).
2. Employee given written notice of performance standards. Standards themselves are subject to review and challenge. *Dancy v. Dep't of Navy*, 55 M.S.P.R. 331 (1992) (finding standard must "invoke general consensus as to its meaning and content"); *Callaway v. Dep't of Army*, 23 M.S.P.R. 592 (1984).
3. Employee given notice of performance deficiencies. 5 C.F.R. § 430.204(j)(2). *Smallwood v. Dep't of Navy*, 52 M.S.P.R. 678 (1992).
  - a. Written notice.
  - b. Memo on SF 7-B of oral notice.
4. Employee given reasonable time to improve.
  - a. Opportunity to improve must be meaningful. *Thomson v. Farm Credit Assoc.*, 51 M.S.P.R. 569 (1991); *Sandland v. GSA*, 23 M.S.P.R. 583 (1984).
  - b. Employee improvement during "performance improvement period" (PIP). *Zoltowski v. Dep't of Army*, 26 M.S.P.R. 525 (1985).

- c. 5 C.F.R. § 432.106 - Employee must maintain acceptable performance for 1 year from beginning of PIP or no new PIP is required. *Sullivan v. Dep't of Navy*, 44 M.S.P.R. 646 (1990); *Cohen v. General Servs. Admin.*, 53 M.S.P.R. 492 (1992).
- 5. Employee's performance in a critical element remains unsatisfactory. *Bowling v. Dep't of Army*, 47 M.S.P.R. 379 (1991); *Johnson v. VA*, 32 M.S.P.R. 443 (1987).
  - a. Employee Efficiency Rating.
  - b. Examples of employee's work product.
  - c. SF 7-B with annotations for all assistance to employee.
  - d. Supervisor's explanation.
- 6. Followed proper procedures. Harmless error rule. 5 U.S.C. § 7701(c)(2)(A); 5 C.F.R. § 1201.56(c)(3).
  - a. 30 days advance written notice.
  - b. Representation.
  - c. Oral and written replies.
  - d. Written decision and concurrence of supervisor in a position higher than proposing official.
- 7. Within 30 days after expiration of advance notice period.
- 8. Standard of Proof--Substantial evidence. 5 U.S.C. § 7701(c)(1)(A).
- 9. Alternative to Chapter 43 action--proceed as Chapter 75 action. *Lovshin v. Dep't of Navy*, 767 F.2d 826 (Fed. Cir. 1985), *cert. denied*, 475 U.S. 1111 (1986); *McGillivray v. FEMA*, 58 M.S.P.R. 398 (1993); *Cook v. EEOC*, 50 M.S.P.R. 660 (1991); ); *Shorey v. Dep't of Army*, 77 M.S.P.R. 239, (1998).

10. MSPB cannot mitigate agency action under Chapter 43. *Lisiecki v. MSPB*, 769 F.2d 1558 (Fed. Cir. 1985), *cert. denied*, 475 U.S. 1108 (1986); *Cook v. EEOC*, 50 M.S.P.R. 660 (1991).

## **VII. CIVILIAN EMPLOYEE MISCONDUCT.**

### **A. Types of Actions and Procedural Requirements.**

1. Informal actions: oral admonitions/warnings. AR 690-700, Ch. 751.1-3b.
2. Formal actions.
  - a. Written reprimands. AR 690-700, Ch. 751.3-2.
  - b. Suspensions for 14 days or less. 5 U.S.C. §§ 7501-7504; AR 690-700, Ch. 752.2-3.
3. "True" adverse actions. 5 U.S.C. §§ 7511-7514; AR 690-700, Ch. 752.3.
  - a. Types of actions.
    - (1) Suspensions for more than 14 days.
    - (2) Furloughs without pay.
    - (3) Reductions in grade or pay.
    - (4) Removals.
  - b. Procedures.
    - (1) 30 days advance written notice.
    - (2) Representation.

(3) Oral and written replies.

(4) Written decision.

B. Proof Requirements.

1. When charging employee misconduct charge only what you can prove. "It is not permissible for the MSPB to split a single charge of an agency into several independent charges and then sustain one of the newly-formulated charges, which represents only a portion of the original charge. If the agency fails to prove one of the elements of its charge, then the entire charge must fail." *Burroughs v. Dep't of Army*, 918 F.2d 170 (Fed. Cir. 1990); *King v. Nazelrod*, 43 F.3d 663 (1994).
2. An agency may charge an employee with both a substantive offense and with false statements (denials) concerning that offense. *Lachance v. Erickson*, 118 S.Ct.753 (1998).
3. Employee committed the act of misconduct.
  - a. Independent evidence.
  - b. Evidence of conviction. *Beasley v. Dep't of Defense*, 52 M.S.P.R. 272 (1992); *Otherson v. Dep't of Justice*, 711 F.2d 267 (D.C. Cir. 1983).
  - c. Evidence of indictment. *Brown v. Dep't of Justice*, 715 F.2d 662 (D.C. Cir. 1983); *Engdahl v. Dep't of Navy*, 900 F.2d 1572 (Fed Cir. 1990); *Jankowitz v. United States*, 533 F.2d 538 (Ct. Cl. 1976).
4. Nexus requirement: Such cause as will promote the efficiency of the service.
  - a. General Rule. Requirement to present evidence of nexus. *Merritt v. Dep't of Justice*, 6 M.S.P.R. 585 (1981).
  - b. Evidence of nexus.

- (1) Current impact at the worksite.
    - (a) Morale problems in office caused by employee's conduct (other employees are uncomfortable working with/around this employee). *Beasley v. Dep't of Defense*, 52 M.S.P.R. 272 (1992); *Sherman v. Alexander*, 684 F.2d 464 (7th Cir. 1982), *cert. denied*, 459 U.S. 1116 (1983).
    - (b) Impairment of office operation (other employees have to pick up workload of problem employee). *Sherman*.
    - (c) Coworkers' apprehension about employee. *Backus v. OPM*, 22 M.S.P.R. 457 (1984).
  - (2) Impact on the organization in broader sense. Incident on agency premises requiring use of agency personnel to deal with misconduct. *Ingram v. Dep't of Air Force*, 53 M.S.P.R. 101, *aff'd*, 980 F.2d 742 (1992); *Franks v. Dep't of the Air Force*, 22 M.S.P.R. 502 (1984).
  - (3) Reasonable concern for future impact. Supervisor loses confidence in employee because of nature of misconduct and nature of job. *Honeycutt v. Dep't of Labor*, 22 M.S.P.R. 491 (1984).
- c. Exception. Nexus may be presumed in certain "egregious circumstances." *Graham v. U.S. Postal Service*, 49 M.S.P.R. 364 (1991); *Merritt v. Dep't of Justice*, 6 M.S.P.R. 585 (1981) *Hayes v. Dep't of Navy*, 727 F.2d 1535 (Fed. Cir. 1984).
- (1) Application of presumption. *Johnson v. HHS*, 22 M.S.P.R. 521 (1984); *Williams v. GSA*, 22 M.S.P.R. 476 (1984); *Hayes v. Dep't of Navy*, 727 F.2d 1535 (Fed. Cir. 1984).
  - (2) Employee rebuttal of presumption. *Abrams v. Dep't of Navy*, 714 F.2d 1219 (3d Cir. 1983); *Johnson*; *Williams*.

5. Appropriateness of penalty choice.



- a. "Douglas Factors." *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981). Relevant factors include:
    - (1) Nature and seriousness of offense;
    - (2) Employee's job;
    - (3) Employee's past disciplinary record;
    - (4) Employee's past work record;
    - (5) Effect of offense on employee's ability to perform job;
    - (6) Consistency with penalties to other employees for similar offenses;
    - (7) Consistency with agency's table of penalties;
    - (8) Impact on agency's reputation;
    - (9) Clarity of notice to employee that conduct proscribed;
    - (10) Potential for employee's rehabilitation;
    - (11) Mitigating circumstances;
    - (12) Adequacy of alternative sanctions to deter misconduct by this employee and others.
  - b. Must present evidence demonstrating consideration of relevant factors (even if employee does not contest propriety of choice). *Parsons v. Dep't of Air Force*, 707 F.2d 1406 (D.C. Cir. 1983).
6. Followed proper procedures. Harmless error rule. 5 U.S.C. § 7701(c)(2)(A); 5 C.F.R. § 1201.56(c)(3).

7. Standard of Proof - An agency must prove all elements of offense charged by a preponderance of the evidence. 5 U.S.C. § 7701(c)(1)(B)). *Jacobs v. Dep't of Justice*, 35 F.3d 1543 (Fed. Cir. 1994); *Perez v. Dep't of Justice*, 65 M.S.P.R. 287 (1994); *Nazelrod v. Dep't of Justice*, 50 M.S.P.R. 456 (1991).
8. Deference to agency in penalty selection--abuse of discretion standard. *Uske v. U.S. Postal Serv.*, 60 M.S.P.R. 544 (1994), *aff'd*, 56 F.3d 1375 (Fed. Cir. 1995); *Betz v. General Servs. Admin.*, 55 M.S.P.R. 424 (1992); *Schulmeister v. Dep't of Navy*, 46 M.S.P.R. 13 (1990), *aff'd*, 928 F.2d 411 (Fed. Cir. 1991).
  - a. When is agency's penalty choice an abuse of discretion? *Miguel v. Dep't of Army*, 727 F.2d 1081 (Fed. Cir. 1984).
    - (1) *De Minimis* misconduct. *Skates v. Dep't of Army*, 69 M.S.P.R. 366 (1996); *Hunt v. U.S. Postal Serv.*, 29 M.S.P.R. 246 (1985); *Taylor v. U.S. Postal Serv.*, 29 M.S.P.R. 350 (1985).
    - (2) Choice of maximum penalty not necessarily abuse of discretion. *Stump v. Dep't of Transp.*, 761 F.2d 680 (Fed. Cir. 1985).
  - b. Not all agency charges sustained. When reviewing a case in which some, but not all, of the agency charges have been sustained, the Board may not independently determine penalties. When the Board sustains fewer than all of the agency's charges, the Board may mitigate to the maximum reasonable penalty so long as the agency has not indicated wither in its final decision or during proceedings before the Board that it desires a lesser penalty be imposed on fewer charges. *LaChance v. Devall*, 178 F. 3d 1246 (1999).
  - c. Beware of mitigation. *Barrett v. Dep't of Transp.*, 65 M.S.P.R. 186 (1994); *Walsh v. Dep't of Veterans Affairs*, 62 M.S.P.R. 586 (1994); *Taylor v. Dep't of Justice*, 60 M.S.P.R. 686 (1994).

C. Practice tips.

1. Early Labor Counselor involvement is essential. Evaluate the evidence. Develop the charges and ensure you can prove the elements.
2. Address the relevant *Douglas* factors in notice of proposed action.
3. Address the relevant *Douglas* factors in the final decision letter.
4. Have the deciding official state the appropriate penalty for each charge he sustains, and then the appropriate cumulative penalty.
5. Present testimony of deciding official at MSPB hearing.
6. Use the table of penalties.
7. Be reasonable!!

## **VIII. CONCLUSION.**

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Information for this area not available.

# ADMINISTRATIVE AND CIVIL LAW DEPARTMENT

## ***BASIC COURSE DESKBOOK***



### **Part IV**

### **Practical Exercises/Seminar**

The Judge Advocate General's School  
United States Army

March 2002

JA 280

## **Administrative and Civil Law Department**

### **Practical Exercises**

#### **Introduction**

The primary purpose of Administrative and Civil Law Department instruction is to introduce you, the Basic Course student, to the myriad areas of legal practice that you might encounter in your first few years of active duty. The general intent is to give you an overview of each area and, hopefully, to provide you with the ability to spot the legal issues and to research the answers.

Certain areas of our instruction, however, involve assignments and issues that almost every new judge advocate encounters in his/her first tour of duty. In these areas, we want you to leave the School armed with more than a lecture and an outline.

We have designed several **practical exercises** that focus on specific problems or issues commonly encountered in the field. Each exercise is different in scope and format. Some exercises require you to do research, thus familiarizing you with the particular legal references you will have to use. Exercises during the General Administrative Law instruction require you to prepare a document, familiarizing you with the particular legal documents that we use and giving you a chance to hone your writing skills. Exercises during the Client Services instruction require you to interview a client and participate in a claims seminar, thus familiarizing you with the interpersonal requirements needed to deal with military clients and to process and adjudicate a personnel claim.

These exercises reflect what military attorneys actually do in the field. They take you out of the "sponge" mode and require you to apply some of the information you have absorbed into creating a useful product. After working these exercises, you should be more comfortable about what will be expected of you in your first assignment.

#### **Scheduling**

During the course, you will receive instruction in basic military legal research and military writing, and you will be given short exercises in these areas. In the weeks that follow, you will receive substantive instruction in administrative and civil law topics, and you will be required to do the more complex practical exercises during this time period.

The practical exercises for the Client Services instruction are at Chapters AA through FF of Volume I of the Administrative and Civil Law Department Basic Course Deskbook. Most of the practical exercises for the General Administrative Law instruction are provided to you in Chapters W through Y of Volume II of the Administrative and Civil Law Department Basic Course Deskbook. Others may be provided to you under separate cover. There is an Administrative and Civil Law topic and reference index included at Chapter Z for your use in the field.

Some of the exercises will be done in class, and others will be take-home. Every effort will be made to schedule the take-home exercises so that you will have ample time to work them prior to the turn-in date and time. All of the exercises will include some sort of wrap-up after your solution has been submitted.

An exact schedule of the practical exercises, including the dates and times when the exercise will be introduced and when the solutions are due, will be provided to you as part of an introduction to the Administrative and Civil Law Department.

### **Student Collaboration**

As a general rule, you may not consult your classmates for advice or assistance in completing the exercises. You are solely responsible for identifying the legal issues, researching the answer, and preparing an organized, concise solution using the required formats. Only after the deadline has passed for a particular exercise, and all solutions have been turned in, may you discuss that exercise with your fellow students.

With certain exercises, the professor may authorize students to work together. Do not assume that you can work together unless the professor has specifically authorized it for that exercise. If you have any questions about whether collaboration is authorized for a given practical exercise, ask the professor.

### **Evaluation**

Specific information on how each practical exercise will be evaluated will be provided with each exercise. Certain exercises, however, will have a direct impact on your Academic Evaluation Report (AER), DA Form 1059 (see figure 1). Paragraphs 14a and 14e on this form provide for a specific evaluation (i.e., "Unsat(isfactory)," "Sat(isfactory)," or "Superior") of written communication and research ability. Administrative and Civil Law Department input for these paragraphs will be obtained as follows:

Written Communication	Research Ability
Report of Survey Exercise (1/3 of grade) OER Appeal Exercise (1/3 of grade)	Report of Survey Exercise (1/2 of grade) OER Appeal Exercise (1/2 of grade)

The final 1/3 of the Written Communication grade will be based upon your grade on the SJA Letter Exercise. The Legal Research and Communications Department administers this practical exercise.

The Report of Survey Exercise (Chapter Y of the General Administrative Law Deskbook) and the OER Appeal Exercise (Chapter AA of the Client Services Deskbook) will be evaluated using the grading criteria shown on the enclosed critique form (see figure 2), and the following standards:

An **Unsatisfactory** solution is one that contains a major deficiency in one or more of the grading criteria. A **Satisfactory** solution is



one that contains no major deficiencies, but contains minor deficiencies in one or more of the grading criteria. A **Superior** solution is one that contains no deficiencies. A deficiency in a particular criteria will be considered "major" if that deficiency occurs numerous times throughout the document; leads the student to a substantive conclusion that is erroneous; or renders the document extremely difficult or impossible to read. Any deficiency that is not "major" is considered "minor."







<b><i>BASIC COURSE PRACTICAL EXERCISE CRITIQUE</i></b>			
<b>STUDENT:</b>	<b>PRACTICAL EXERCISE:</b>		
<b>ADVISOR:</b>	<b>DATE:</b>		
<b>AREA</b>	<b>YES</b>	<b>NO (MINOR)</b>	<b>NO (MAJOR)</b>
<b>I. WRITING.</b> Did the student:			
a. type the solution?			
b. use proper citation?			
c. use proper grammar (i.e., spelling and punctuation)?			
d. express thoughts clearly?			
e. write in an orderly, concise manner?			
f. develop thoughts logically?			
g. differentiate between law, policy, and opinion?			
h. make findings and recommend specific action?			
i. use the proper format(s)?			
<b>II. RESEARCH.</b> Did the student:			
a. find and research all pertinent legal issues?			
b. research all appropriate references?			
c. properly correlate different references?			
d. reasonably interpret references used?			
e. reasonably apply research to the legal issues presented?			
<b>III. OVERALL STUDENT PERFORMANCE.</b>	<b>SUP</b>	<b>SAT</b>	<b>UNSAT</b>
a. Written Communication			
b. Research Ability			

**NOTE:** SUP = satisfied all criteria; SAT = one or more minor deficiencies; UNSAT = one or more major deficiencies.

***Please place any required comments on the reverse.***

Figure 2



## CHAPTER W

JAGS-ADA (351)

3 January 2002

MEMORANDUM FOR Judge Advocate Officer Basic Course Students

SUBJECT: Line of Duty Investigations and Determinations Practical Exercise

1. Judge Advocates review line of duty investigations for legal sufficiency. This exercise introduces a line of duty investigation to Judge Advocate Officer Basic Course Students. We will discuss the exercise as part of your Line of Duty class on 22 March 2002. **Prior to class, you must review the factual situation and prepare to discuss the problem. A written submission is not part of this exercise.**
2. Background. You just arrived at Fort Blank, Virginia, and the Staff Judge Advocate assigned you to the Administrative Law Division. Your boss, Major O. Bob Grastefon, summons you to his office ostensibly to discuss office procedures, but in fact spends forty minutes regaling you with a gory hunting story in excruciating detail. On the way out of his office, he hands you the enclosed line of duty investigation for your review.
3. Assignment. Review the file and be prepared to discuss the facts and legal issues in class.
4. Research Library. All of your research materials are provided in the enclosed packet, "Line of Duty Determinations."
5. **I will not grade this exercise.** Feel free to discuss the materials and issues with fellow students. Keep track of questions or comments so we can discuss them in class. Please see me if you have any questions.

Encl  
as

EVAN M. STONE  
MAJ, JA  
Professor, Administrative and  
Civil Law Department





15 November 200X

MEMORANDUM FOR Staff Judge Advocate, ATTN: Administrative Law

SUBJECT: Request for Legal Opinion

1. Request legal opinion regarding the enclosed line of duty investigation on PFC Marin, John, 123-45-6789. Is the evidence sufficient to support a finding of In the Line of Duty? The investigating officer (IO) will prepare the DD Form 261, Report of Investigation (Line of Duty and Misconduct Status) based on your input.
2. Point of Contact (POC) is 1LT J. Russel, 972-6359.

Encl

HENRY A. ROWLAND  
1LT, FA  
Acting Adjutant

3 November 200X

MEMORANDUM FOR First Lieutenant John J. Russel, B Co, 1st Battalion, 21st Artillery, Fort Blank, Virginia 22222

SUBJECT: Appointment as Line of Duty Investigating Officer (IO)

1. You are appointed as IO for a line of duty investigation IAW AR 600-8-1.
2. You will perform a line of duty investigation IAW AR 600-8-1. You will investigate the details surrounding the injury of PFC Marin, John, 123-45-6789, Company A, 1st Battalion, 21st Artillery. The incident occurred on or about 1 October 200X.
3. Your primary duty is to conduct this investigation and submit your findings to the appointing authority. Your findings will be supported by substantial evidence. Submit your report of findings on DD Form 261 no later than 15 November 200X.

FOR THE COMMANDER:

DOUGLAS C. HYDE  
MAJ, FA  
Acting Adjutant

<b>STATEMENT OF MEDICAL EXAMINATION AND DUTY STATUS</b> <small>For use of this form, see AR 600-8-1, the proponent agency is DCSPER</small>					
<b>THRU: (Include ZIP Code)</b> Commander A CO 1/21 FA Fort Blank, VA 22222		<b>TO: (Include ZIP Code)</b> Commander A CO 1/21 FA Fort Blank, VA 22222			
<b>FROM: (Include ZIP Code)</b> Commander Fort Blank Community Hospital Fort Blank, VA 22222					
<b>1. NAME OF INDIVIDUAL EXAMINED (Last, First, and Middle Initial)</b> MARIN, JOHN		<b>2. SSN</b> 123-45-6789	<b>3. GRADE</b> (E-3) PFC		
<b>4. ORGANIZATION AND STATION</b> A CO 1/21 FA Fort Blank, VA 22222		<b>5. ACCIDENT INFORMATION</b> <table style="width: 100%; border: none;"> <tr> <td style="width: 50%; border: none; padding: 2px;"> <b>a. DATE</b>            2 October 200X         </td> <td style="width: 50%; border: none; padding: 2px;"> <b>b. PLACE (City and State)</b>            Fort Blank, VA 22222         </td> </tr> </table>		<b>a. DATE</b> 2 October 200X	<b>b. PLACE (City and State)</b> Fort Blank, VA 22222
<b>a. DATE</b> 2 October 200X	<b>b. PLACE (City and State)</b> Fort Blank, VA 22222				
<b>SECTION I - TO BE COMPLETED BY ATTENDING PHYSICIAN OR HOSPITAL PATIENT ADMINISTRATOR</b>					
<b>6. INDIVIDUAL WAS</b> <input type="checkbox"/> OUT PATIENT <input checked="" type="checkbox"/> ADMITTED <input type="checkbox"/> DEAD ON ARRIVAL		<b>7. NAME OF HOSPITAL OR TREATMENT FACILITY</b> <input type="checkbox"/> CIVILIAN <input checked="" type="checkbox"/> MILITARY Fort Blank Community Hospital			
<b>8. HOUR AND DATE ADMITTED</b> 1320 1 October 200X		<b>9. HOUR AND DATE EXAMINED</b> 1530 1 October 200X			
<b>10. NATURE AND EXTENT OF</b> <input checked="" type="checkbox"/> INJURY <input type="checkbox"/> DISEASE <input type="checkbox"/> RESULTING IN DEATH Facial Trauma					
<b>11. MEDICAL OPINION:</b> <table style="width: 100%; border: none;"> <tr> <td style="width: 50%; border: none; padding: 2px;"> <b>a.</b> INDIVIDUAL <input type="checkbox"/> WAS <input checked="" type="checkbox"/> WAS NOT UNDER THE INFLUENCE OF <input type="checkbox"/> ALCOHOL <input type="checkbox"/> DRUGS (Specify):  <b>b.</b> INDIVIDUAL <input checked="" type="checkbox"/> WAS <input type="checkbox"/> WAS NOT MENTALLY SOUND (Attach Psychiatric evaluation if appropriate).  <b>c.</b> INJURY <input type="checkbox"/> IS <input checked="" type="checkbox"/> IS NOT LIKELY TO RESULT IN A CLAIM AGAINST THE GOVERNMENT FOR FUTURE MEDICAL CARE.  <b>d.</b> INJURY <input type="checkbox"/> WAS <input type="checkbox"/> WAS NOT INCURRED IN LINE OF DUTY.             </td> <td style="width: 50%; border: none; padding: 2px;"> <b>BASIS FOR OPINION:</b>            UNKNOWN             </td> </tr> </table>				<b>a.</b> INDIVIDUAL <input type="checkbox"/> WAS <input checked="" type="checkbox"/> WAS NOT UNDER THE INFLUENCE OF <input type="checkbox"/> ALCOHOL <input type="checkbox"/> DRUGS (Specify): <b>b.</b> INDIVIDUAL <input checked="" type="checkbox"/> WAS <input type="checkbox"/> WAS NOT MENTALLY SOUND (Attach Psychiatric evaluation if appropriate). <b>c.</b> INJURY <input type="checkbox"/> IS <input checked="" type="checkbox"/> IS NOT LIKELY TO RESULT IN A CLAIM AGAINST THE GOVERNMENT FOR FUTURE MEDICAL CARE. <b>d.</b> INJURY <input type="checkbox"/> WAS <input type="checkbox"/> WAS NOT INCURRED IN LINE OF DUTY.	<b>BASIS FOR OPINION:</b> UNKNOWN
<b>a.</b> INDIVIDUAL <input type="checkbox"/> WAS <input checked="" type="checkbox"/> WAS NOT UNDER THE INFLUENCE OF <input type="checkbox"/> ALCOHOL <input type="checkbox"/> DRUGS (Specify): <b>b.</b> INDIVIDUAL <input checked="" type="checkbox"/> WAS <input type="checkbox"/> WAS NOT MENTALLY SOUND (Attach Psychiatric evaluation if appropriate). <b>c.</b> INJURY <input type="checkbox"/> IS <input checked="" type="checkbox"/> IS NOT LIKELY TO RESULT IN A CLAIM AGAINST THE GOVERNMENT FOR FUTURE MEDICAL CARE. <b>d.</b> INJURY <input type="checkbox"/> WAS <input type="checkbox"/> WAS NOT INCURRED IN LINE OF DUTY.	<b>BASIS FOR OPINION:</b> UNKNOWN				
<b>12. THE FOLLOWING DISABILITY MAY RESULT</b> <input checked="" type="checkbox"/> TEMPORARY <input type="checkbox"/> PERMANENT PARTIAL <input type="checkbox"/> PERMANENT TOTAL		<b>13. BLOOD ALCOHOL TEST MADE</b> <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO	<b>14. NO. OF MG ALCOHOL/100 ML BLOOD</b>		
<b>15. DETAILS OF ACCIDENT OR HISTORY OF DISEASE (how, where, when)</b> Barracks Fight					
<b>16. DATE</b> 5 October 200X	<b>17. TYPED OR PRINTED NAME OF ATTENDING PHYSICIAN OR PATIENT ADMINISTRATOR</b> SAM A. HUGHES, CPT, MS Patient Administrator		<b>18. SIGNATURE</b>		
<b>SECTION II - TO BE COMPLETED BY UNIT COMMANDER OR UNIT ADVISER</b>					
<b>19. DUTY STATION</b> <input checked="" type="checkbox"/> PRESENT FOR DUTY <input type="checkbox"/> ABSENT WITHOUT AUTHORITY <input type="checkbox"/> ABSENT WITH AUTHORITY: <input type="checkbox"/> ON PASS <input type="checkbox"/> ON LEAVE		<b>20. HOUR AND DATE OF ABSENCE</b> <table style="width: 100%; border: none;"> <tr> <td style="width: 50%; border: none; padding: 2px;"> <b>a. FROM</b> </td> <td style="width: 50%; border: none; padding: 2px;"> <b>b. TO</b> </td> </tr> </table>		<b>a. FROM</b>	<b>b. TO</b>
<b>a. FROM</b>	<b>b. TO</b>				
<b>21. ABSENCE WITHOUT AUTHORITY MATERIALLY INTERFERED WITH THE PERFORMANCE OF MILITARY DUTY (Explain in Item 30 type of duty missed, hours of duty, and how it did or did not interfere with performance)</b> <input type="checkbox"/> YES <input type="checkbox"/> NO					
<b>22. INDIVIDUAL WAS ON</b> <input checked="" type="checkbox"/> ACTIVE DUTY <input type="checkbox"/> ACTIVE DUTY FOR TRAINING <input type="checkbox"/> INACTIVE DUTY TRAINING		<b>23. HOUR AND DATE TRAINING</b> <table style="width: 100%; border: none;"> <tr> <td style="width: 50%; border: none; padding: 2px;"> <b>a. BEGAN</b>            1 August 200X         </td> <td style="width: 50%; border: none; padding: 2px;"> <b>b. ENDED</b> </td> </tr> </table>		<b>a. BEGAN</b> 1 August 200X	<b>b. ENDED</b>
<b>a. BEGAN</b> 1 August 200X	<b>b. ENDED</b>				
<b>24. RESERVIST DIED OF INJURIES RECEIVED PROCEEDING</b> <input type="checkbox"/> DIRECTLY TO TRAINING <input type="checkbox"/> DIRECTLY FROM TRAINING					
<b>25. MODE OF TRANSPORTATION</b>	<b>26. HOUR BEGINNING TRAVEL</b>	<b>27. DISTANCE INVOLVED</b>	<b>28. NORMAL TIME FOR TRAVEL</b>		
<b>29. DUTY STATUS AT TIME OF DEATH IF DIFFERENT FROM TIME OF INJURY OR CONTRACTION OF DISEASE</b> <input type="checkbox"/> PRESENT FOR DUTY <input type="checkbox"/> ABSENT WITH AUTHORITY <input type="checkbox"/> ABSENT WITHOUT AUTHORITY					
<b>30. DETAILS OF ACCIDENT - REMARKS (If additional space is needed, continue on reverse) (Attach inclosures as necessary)</b> On 1 October 200X, PFC Marin and PVT Malone fought. PVT Malone allegedly struck PFC Marin in the face causing a fracture of his cheekbone. A litter team brought PFC Marin to Fort Blank Community Hospital.					
<b>31. FORMAL LINE OF DUTY INVESTIGATION REQUIRED</b> <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO		<b>32. INJURY IS CONSIDERED TO HAVE BEEN INCURRED IN LINE OF DUTY (Not applicable on deaths)</b> <input type="checkbox"/> YES <input type="checkbox"/> NO			
<b>33. DATE</b> 16 October 200X	<b>34. TYPED NAME AND GRADE OF UNIT COMMANDER OR UNIT ADVISER</b> STEVEN J. ROWSON, 1LT, FA, XO		<b>35. SIGNATURE</b>		

DA FORM 2173, OCT 73

REPLACES DA FORM 2173, 1 JUN 66, WHICH IS OBSOLETE.



<b>MILITARY POLICE REPORT</b> For use of this form, see AR 190-45; the proponent agency is ODCSOPS		MILITARY POLICE REPORT NUMBER <b>0250-0X-A</b>	DATE <b>0X1005</b>	USACRC CONTROL NUMBER <b>0X-A-0250-B</b>	
THRU: CDR, 52D FA BDE CDR, 1/21 FA BN FORT BLANK, VA 22222		TO: CDR A CO, 1/21ST FA FORT BLANK, VA 22222		FROM: CDR, FORT BLANK ATTN: ABCD-MP FORT BLANK, VA 22222	
1. REPORT TYPE/STATUS: <input type="checkbox"/> Information <input type="checkbox"/> Commander's Action (DA Form 4833) <input type="checkbox"/> Supplemental <input checked="" type="checkbox"/> Complaint					
2. EVALUATION: <input checked="" type="checkbox"/> Criminal Offense <input type="checkbox"/> Military Offense <input type="checkbox"/> Traffic Offense <input type="checkbox"/> Founded <input type="checkbox"/> Unfounded <input type="checkbox"/> Information					
3. COMPLAINT/OFFENSE/INCIDENT (See Reverse/Attached for Summary) ART 128, ASSAULT, SUBJ 1; ART 128, ASSAULT, SUBJ 2 (over)		4. LOCATION <input checked="" type="checkbox"/> On Post <input type="checkbox"/> Off Post (Address) BLEACHER AREA, ADJACENT A CO, 1/21ST FA FORT BLANK, VA 22222		5. TIME OF OFFENSE  1130	6. DATE OF OFFENSE  0X1001
7. OFFENSE CODES 5C1K		8. COMPLAINT RECEIVED BY		9. TIME RECEIVED 1200	10. DATE RECEIVED 0X1001
11. MP ACTION REFERRED TO: <input checked="" type="checkbox"/> MPI <input type="checkbox"/> CID <input type="checkbox"/> Civil Authorities <input type="checkbox"/> Traffic <input type="checkbox"/> Other (Specify)					a. DATE REFERRED
12. NAME OF SUBJECT MARIN, JOHN A.		a. GRADE PFC	b. ORGANIZATION (Include address and telephone number) A CO, 1/21ST FA FORT BLANK, VA 22222		
c. SSN 123-45-6789	d. PLACE OF BIRTH Charlottesville, VA	e. DATE OF BIRTH 720611			
f. CAT (1) A	g. COLOR HAIR BROWN	h. COLOR EYES BLUE	i. WEIGHT 165	j. HEIGHT 68"	k. AGE 23
l. JUVENILE <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No		m. SEX <input checked="" type="checkbox"/> Male <input type="checkbox"/> Female			
n. COMPLEXION FAIR	o. RACE (2) C	13. INVOLVEMENT <input type="checkbox"/> Alcohol <input type="checkbox"/> Drugs	14. DRESS <input checked="" type="checkbox"/> Uniform <input type="checkbox"/> Civilian	15. COOPERATIVE <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	16. IDENTIFYING MARKS NONE VISIBLE
<b>17. PERSONS RELATED TO REPORT (Place Additional Entries on Reverse/Attached)</b>					
a. NAME	b. GRADE	c. SSN	d. ORGANIZATION/ADDRESS/TELEPHONE NO.	e. (1)	f. (3)
MATTHEWS, STANLEY R.	SSG	678-91-0123	A CO, 1/21ST FA FORT BLANK, VA 22222	A	B
LAUGHTON, CHARLES O.	PVT	802-12-2395	A CO, 1/21ST FA FORT BLANK, VA 22222	A	B
COLGATE, WILLIAM F.	PVT	218-67-8011	A CO, 1/21ST FA FORT BLANK, VA 22222	A	B
TRACEY, RICHARD	MPI		MILITARY POLICE STATION FORT BLANK, VA 22222	A	E
HOLMES, SHERLOCK	MPI		MILITARY POLICE STATION FORT BLANK, VA 22222	A	E
<b>18. PROPERTY DATA</b>			<b>19. DISPOSITION OF</b>		
a. DATE	b. (4)	c. (5)	d. AMOUNT	a. OFFENDER RELEASED TO DRILL SGT ON DD FORM 629	
N/A				b. EVIDENCE NONE TAKEN	
ENCLOSURES 5-DA 2823 2-DA 3881			DISTRIBUTION 1-PM FILES 1-UNIT		
<b>FOR THE COMMANDER (Strike out if not applicable)</b>					
TYPED NAME, RANK AND TITLE OF REPORTING OFFICER BESSIE B. TUCKER CHIEF, PM ADMIN					
SIGNATURE					
(1) CATEGORY		(2) RACE	(3) STATUS	(4) PROPERTY TYPE	(5) PROP ACTION
A-Army B-Other Service C-Family Member D-DA Civilian E-Civilian		F-Contractor G-Other Govt Empl H-FGN Natl Empl I-Other FGN Natl J-Other	R-Red M-Yellow N-Black C-White H-Hispanic X-Other	A-Not Used B-Witness C-Victim D-Complainant	E-Military Police F-Civil Authorities G-Sponsor
A-Govt Prop/Funds B-Govt Vehicle C-NAF Prop/Funds D-NAF Vehicle		E-Private Property F-Private Vehicle G-Host Govt Prop/Funds H-Host Govt Vehicle		A-Lost B-Stolen C-Recovered D-Damaged	



<b>SWORN STATEMENT</b> <small>For use of this form, see AR 190-45; the proponent agency is ODCSOPS</small>			
LOCATION FORT BLANK, VA 22222	DATE 3 OCT 0X	TIME 1830	FILE NUMBER
LAST NAME, FIRST NAME, MIDDLE NAME MARIN, JOHN A.	SOCIAL SECURITY NUMBER 123-45-6789		GRADE/STATUS PFC
ORGANIZATION OR ADDRESS A CO, 1/21ST FA BN, FORT BLANK, VA 22222			
<p>I, <u>JOHN A. MARIN</u>, WANT TO MAKE THE FOLLOWING STATEMENT UNDER OATH:</p> <p>I, John Marin, was sitting at the bleachers eating sack lunches when PVT Malone was asking where his bag of chips was. He couldn't find it so he grabbed mine and said it was his which I told him no, because I'd remembered setting my chips down so I grabbed it back. Then I saw him grab SPC Boon's bag of chips and then he grabbed mine and crushed them up and placed them in his brown bag. Then I reached over and crushed the bag of chips he had. After that I remembered getting hit in the face and stood up and hit PVT Malone with my palm in back of the head and took off running. PVT Malone then caught up to me and I only remember getting hit once; then I apparently blacked out. I vaguely remember what went on after that, but I did remember waking up in back of a truck. END OF STATEMENT</p>			
EXHIBIT D	INITIALS OF PERSON MAKING STATEMENT		PAGE 1 OF <u>1</u> PAGES
<small>ADDITIONAL PAGES MUST CONTAIN THE HEADING "STATEMENT OF ____ TAKEN AT ____ DATED ____ CONTINUED." THE BOTTOM OF EACH ADDITIONAL PAGE MUST BEAR THE INITIALS OF THE PERSON MAKING THE STATEMENT AND BE INITIALED AS "PAGE ____ OF ____ PAGES." WHEN ADDITIONAL PAGES ARE UTILIZED, THE BACK OF PAGE 1 WILL BE LINED OUT, AND THE STATEMENT WILL BE CONCLUDED ON THE REVERSE SIDE OF ANOTHER COPY OF THIS FORM.</small>			



STATEMENT (Continued)  
NOTHING FOLLOWS

AFFIDAVIT

I, JOHN A. MARIN, HAVE READ OR HAVE HAD READ TO ME THIS STATEMENT WHICH BEGINS ON PAGE 1 AND ENDS ON PAGE 1. I FULLY UNDERSTAND THE CONTENTS OF THE ENTIRE STATEMENT MADE BY ME. THE STATEMENT IS TRUE. I HAVE INITIALED ALL CORRECTIONS AND HAVE INITIALED THE BOTTOM OF EACH PAGE CONTAINING THE STATEMENT. I HAVE MADE THIS STATEMENT FREELY WITHOUT HOPE OF BENEFIT OR REWARD, WITHOUT THREAT OF PUNISHMENT, AND WITHOUT COERCION, UNLAWFUL INFLUENCE, OR UNLAWFUL INDUCEMENT.

\_\_\_\_\_  
(Signature of Person Making Statement)

WITNESSES:

Subscribed and sworn to before me, a person authorized by law to administer oaths, this 3d day of October, 19      at Fort Blank, VA 22222

\_\_\_\_\_  
ORGANIZATION OR ADDRESS

\_\_\_\_\_  
(Signature of Person Administering Oath)

JOHN J. RUSSEL, 1LT, FA

\_\_\_\_\_  
(Typed Name of Person Administering Oath)

\_\_\_\_\_  
ORGANIZATION OR ADDRESS

ART 136, UCMJ (b)(4)

\_\_\_\_\_  
(Authority To Administer Oaths)

INITIALS OF PERSON MAKING STATEMENT

PAGE 1 OF 1 PAGES

USAPPC V2.00



<b>SWORN STATEMENT</b> <small>For use of this form, see AR 190-45; the proponent agency is ODCSOPS</small>			
<b>LOCATION</b> FORT BLANK, VA 22222	<b>DATE</b> 2 OCT 0X	<b>TIME</b> 1457	<b>FILE NUMBER</b>
<b>LAST NAME, FIRST NAME, MIDDLE NAME</b> MALONE, EDWARD R.	<b>SOCIAL SECURITY NUMBER</b> 345-67-8910		<b>GRADE/STATUS</b> PVT
<b>ORGANIZATION OR ADDRESS</b> A CO, 1/21ST FA BN, FORT BLANK, VA 22222			
<p>I, <u>EDWARD R. MALONE</u>, WANT TO MAKE THE FOLLOWING STATEMENT UNDER OATH:</p> <p>I, PVT Malone, was sitting on the bleachers eating a sacked lunch when I realized that my bag of chips was missing that I placed beside my sandwiches. I asked PVT Marin if those were my chips he had and he said no. Then I asked SPC Boon if those were mine that were laying beside him, and he said no. Then I asked where were his laying, he told me the same place that I put mine earlier so I told him that they were mine and I got them. He took them back from me and I got them back from him and smashed them and emptied them into the brown sack so neither of us could have them. Then SPC Boon gave me his and I gave PVT Marin the chips in the brown sack. Then I gave him the empty chip bag with the chips in the bag (brown bag). Then he gave the empty bag back to me, then I gave it back to him. He gave it back then I pushed the bag in his chest. Then he stood up and said if you want to hit me again mother%\$#@#&amp;^?, hit me. Then I just started back eating. That's when he punched me in the back of my head. He started running and I caught him and hit him about twice and got up.</p> <p>Q: INV RICHARD TRACEY            A: PVT EDWARD MALONE</p> <p>Q: DID PVT MARIN OR SPC BOON EVER ADMIT TO TAKING YOUR CHIPS?            A: NO.</p> <p>Q: HOW MANY TIMES WERE YOU STRUCK BY PVT MARIN?            A: ONCE.</p> <p>Q: HOW MANY TIMES DID YOU STRIKE PVT MARIN EXCEPT FOR THE TWO TIMES AFTER YOU CHASED HIM?            A: THAT WAS IT.</p> <p>Q: WHERE DID YOU STRIKE PVT MARIN?            A: I HIT HIM IN THE FACE.</p> <p>Q: WHAT WAS THE APPROXIMATE TIME THAT THIS INCIDENT OCCURRED?            A: ABOUT 1145.</p> <p>Q: WHERE DID THIS INCIDENT TAKE PLACE?            A: IN THE COMPANY AREA.</p> <p>Q: HOW DID YOU STRIKE PVT MARIN (OPEN OR CLOSED FISTS)?            A: CLOSED.</p> <p>Q: HOW DID PVT MARIN STRIKE YOU (IN THE BACK OF THE HEAD)?            A: WITH HIS FIST.</p> <p>Q: DO YOU HAVE ANY FURTHER INFORMATION TO ADD TO THIS STATEMENT AT THIS TIME?            A: NO, SIR.</p> <p>END OF STATEMENT</p>			
<b>EXHIBIT</b> E	<b>INITIALS OF PERSON MAKING STATEMENT</b>		PAGE 1 OF <u>1</u> PAGES
<small>ADDITIONAL PAGES MUST CONTAIN THE HEADING "STATEMENT OF ____ TAKEN AT ____ DATED ____ CONTINUED." THE BOTTOM OF EACH ADDITIONAL PAGE MUST BEAR THE INITIALS OF THE PERSON MAKING THE STATEMENT AND BE INITIALED AS "PAGE ____ OF ____ PAGES." WHEN ADDITIONAL PAGES ARE UTILIZED, THE BACK OF PAGE 1 WILL BE LINED OUT, AND THE STATEMENT WILL BE CONCLUDED ON THE REVERSE SIDE OF ANOTHER COPY OF THIS FORM.</small>			

STATEMENT (Continued)  
NOTHING FOLLOWS

AFFIDAVIT

I, JOHN A. MARIN, HAVE READ OR HAVE HAD READ TO ME THIS STATEMENT WHICH BEGINS ON PAGE 1 AND ENDS ON PAGE 1. I FULLY UNDERSTAND THE CONTENTS OF THE ENTIRE STATEMENT MADE BY ME. THE STATEMENT IS TRUE. I HAVE INITIALED ALL CORRECTIONS AND HAVE INITIALED THE BOTTOM OF EACH PAGE CONTAINING THE STATEMENT. I HAVE MADE THIS STATEMENT FREELY WITHOUT HOPE OF BENEFIT OR REWARD, WITHOUT THREAT OF PUNISHMENT, AND WITHOUT COERCION, UNLAWFUL INFLUENCE, OR UNLAWFUL INDUCEMENT.

\_\_\_\_\_  
(Signature of Person Making Statement)

WITNESSES:

Subscribed and sworn to before me, a person authorized by law to administer oaths, this 3d day of October, 19\_\_\_\_  
at Fort Blank, VA 22222

\_\_\_\_\_  
ORGANIZATION OR ADDRESS

\_\_\_\_\_  
(Signature of Person Administering Oath)

JOHN J. RUSSEL, 1LT, FA  
(Typed Name of Person Administering Oath)

\_\_\_\_\_  
ORGANIZATION OR ADDRESS

ART 136, UCMJ (b)(4)  
(Authority To Administer Oaths)

INITIALS OF PERSON MAKING STATEMENT

PAGE 1 OF 1 PAGES

USAPPC V2.00

<b>SWORN STATEMENT</b> <small>For use of this form, see AR 190-45; the proponent agency is ODCSOPS</small>			
LOCATION FORT BLANK, VA 22222	DATE 2 OCT 0X	TIME 1246	FILE NUMBER
LAST NAME, FIRST NAME, MIDDLE NAME LAUGHTON, CHARLES O.	SOCIAL SECURITY NUMBER 802-13-2395		GRADE/STATUS PVT
ORGANIZATION OR ADDRESS A CO, 1/21ST FA BN, FORT BLANK, VA 22222			
<p>I, <u>CHARLES O. LAUGHTON</u>, WANT TO MAKE THE FOLLOWING STATEMENT UNDER OATH:</p> <p>I witnessed PVT Malone chasing PVT Marin through the company area. As Malone caught Marin, they fell to the ground. Malone rolled on top of Marin and struck him several times in the facial area. Then Malone jumped up and proceeded to walk away. This incident occurred at approximately 1115 on the date of 1 Oct 0X.</p> <p>END OF STATEMENT</p>			
EXHIBIT F	INITIALS OF PERSON MAKING STATEMENT		PAGE 1 OF <u>1</u> PAGES
<small>           ADDITIONAL PAGES MUST CONTAIN THE HEADING "STATEMENT OF ____ TAKEN AT ____ DATED ____ CONTINUED."            THE BOTTOM OF EACH ADDITIONAL PAGE MUST BEAR THE INITIALS OF THE PERSON MAKING THE STATEMENT AND BE INITIALED            AS "PAGE ____ OF ____ PAGES." WHEN ADDITIONAL PAGES ARE UTILIZED, THE BACK OF PAGE 1 WILL BE LINED OUT, AND THE            STATEMENT WILL BE CONCLUDED ON THE REVERSE SIDE OF ANOTHER COPY OF THIS FORM.         </small>			

STATEMENT (Continued)  
NOTHING FOLLOWS

AFFIDAVIT

I, CHARLES O. LAUGHTON, HAVE READ OR HAVE HAD READ TO ME THIS STATEMENT WHICH BEGINS ON PAGE 1 AND ENDS ON PAGE 1. I FULLY UNDERSTAND THE CONTENTS OF THE ENTIRE STATEMENT MADE BY ME. THE STATEMENT IS TRUE. I HAVE INITIALED ALL CORRECTIONS AND HAVE INITIALED THE BOTTOM OF EACH PAGE CONTAINING THE STATEMENT. I HAVE MADE THIS STATEMENT FREELY WITHOUT HOPE OF BENEFIT OR REWARD, WITHOUT THREAT OF PUNISHMENT, AND WITHOUT COERCION, UNLAWFUL INFLUENCE, OR UNLAWFUL INDUCEMENT.

\_\_\_\_\_  
(Signature of Person Making Statement)

WITNESSES:

Subscribed and sworn to before me, a person authorized by law to administer oaths, this 2d day of October, 19\_\_\_\_ at \_\_\_\_\_

\_\_\_\_\_  
ORGANIZATION OR ADDRESS

\_\_\_\_\_  
(Signature of Person Administering Oath)

JOHN J. RUSSEL, 1LT, FA

\_\_\_\_\_  
(Typed Name of Person Administering Oath)

\_\_\_\_\_  
ORGANIZATION OR ADDRESS

ART 136, UCMJ (b)(4)

\_\_\_\_\_  
(Authority To Administer Oaths)

INITIALS OF PERSON MAKING STATEMENT

PAGE 1 OF 1 PAGES

USAPPC V2.00

<b>SWORN STATEMENT</b> <small>For use of this form, see AR 190-45; the proponent agency is ODCSOPS</small>			
<b>LOCATION</b> FORT BLANK, VA 22222	<b>DATE</b> 2 OCT 0X	<b>TIME</b> 1300	<b>FILE NUMBER</b>
<b>LAST NAME, FIRST NAME, MIDDLE NAME</b> COLGATE, WILLIAM F.	<b>SOCIAL SECURITY NUMBER</b> 218-67-8011		<b>GRADE/STATUS</b> E-1
<b>ORGANIZATION OR ADDRESS</b> A CO, 1/21ST FA, FORT BLANK, VA 22222			
<p>I, <u>WILLIAM F. COLGATE</u>, WANT TO MAKE THE FOLLOWING STATEMENT UNDER OATH:</p> <p>On 2 Oct 0X at about 1115, I saw Malone and Marin on the top of the bleachers. They were arguing I don't know about what. I was sitting on the bottom facing them eating lunch. Then Marin jumped up and started talking shit to Malone. I told Marin to SIT down. I told him a few times. Then Marin SLAPPED Malone on the back of the head and then Marin ran and Malone chased him and caught him. They rolled over each other and Malone punched 5-6 times. Malone got off I went over and thought he was taking seizure, his body was tight and his eyes were rolled back. Then SGT Nelson came over and told us to get him on his feet and then he performed the Heimlick maneuver on him, then we laid down, then SGT Matthews came over and made me get blankets and then we picked him up and took him to the hospital. END OF STATEMENT</p>			
<b>EXHIBIT</b> G	<b>INITIALS OF PERSON MAKING STATEMENT</b>		<b>PAGE 1 OF</b> <u>1</u> <b>PAGES</b>
<small>ADDITIONAL PAGES MUST CONTAIN THE HEADING "STATEMENT OF _____ TAKEN AT _____ DATED _____ CONTINUED."            THE BOTTOM OF EACH ADDITIONAL PAGE MUST BEAR THE INITIALS OF THE PERSON MAKING THE STATEMENT AND BE INITIALED AS "PAGE _____ OF _____ PAGES." WHEN ADDITIONAL PAGES ARE UTILIZED, THE BACK OF PAGE 1 WILL BE LINED OUT, AND THE STATEMENT WILL BE CONCLUDED ON THE REVERSE SIDE OF ANOTHER COPY OF THIS FORM.</small>			



STATEMENT (Continued)  
NOTHING FOLLOWS

AFFIDAVIT

I, WILLIAM F. COLGATE, HAVE READ OR HAVE HAD READ TO ME THIS STATEMENT WHICH BEGINS ON PAGE 1 AND ENDS ON PAGE 1. I FULLY UNDERSTAND THE CONTENTS OF THE ENTIRE STATEMENT MADE BY ME. THE STATEMENT IS TRUE. I HAVE INITIALED ALL CORRECTIONS AND HAVE INITIALED THE BOTTOM OF EACH PAGE CONTAINING THE STATEMENT. I HAVE MADE THIS STATEMENT FREELY WITHOUT HOPE OF BENEFIT OR REWARD, WITHOUT THREAT OF PUNISHMENT, AND WITHOUT COERCION, UNLAWFUL INFLUENCE, OR UNLAWFUL INDUCEMENT.

\_\_\_\_\_  
(Signature of Person Making Statement)

WITNESSES:

Subscribed and sworn to before me, a person authorized by law to administer oaths, this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_ at \_\_\_\_\_

\_\_\_\_\_  
ORGANIZATION OR ADDRESS

\_\_\_\_\_  
(Signature of Person Administering Oath)

\_\_\_\_\_  
(Typed Name of Person Administering Oath)

\_\_\_\_\_  
ORGANIZATION OR ADDRESS

\_\_\_\_\_  
(Authority To Administer Oaths)

INITIALS OF PERSON MAKING STATEMENT

PAGE 1 OF 1 PAGES

USAPPC V2.00

<b>SWORN STATEMENT</b> <small>For use of this form, see AR 190-45; the proponent agency is ODCSOPS</small>			
<b>LOCATION</b> FORT BLANK, VA 22222	<b>DATE</b> 10 OCT 0X	<b>TIME</b> 1245	<b>FILE NUMBER</b>
<b>LAST NAME, FIRST NAME, MIDDLE NAME</b> MATTHEWS, STANLEY R.	<b>SOCIAL SECURITY NUMBER</b> 678-91-0123		<b>GRADE/STATUS</b> SSG
<b>ORGANIZATION OR ADDRESS</b> A CO, 1/21ST FA BN, FORT BLANK, VA 22222			
<p>I, <u>STANLEY R. MATTHEWS</u>, WANT TO MAKE THE FOLLOWING STATEMENT UNDER OATH:</p> <p>At approximately 1115, 1 Oct 0X, I, SSG Matthews, was in the unit dayroom, when a private came running in and said there was a hurt PVT. I then proceeded to go outside and seen PVT Marin lying face down. I said: Marin, what is your first name, he said John. I then said: Do you know who I am, he said Matthews. I asked him if he was hurt anywhere besides his face. He said no, I then told Marin we were gonna place him on his back and if he hurt while doing this let us know. Myself and SGT Nelson rolled him on to his back. I then called two privates over to Marin and then told Marin we were gonna place him into the pickup. We did this then I proceeded to the hospital.</p> <p>Q: DID YOU IDENTIFY THE OTHER PERSON IN THE FIGHT?            A: YES.            Q: WHAT IS HIS NAME?            A: PVT MALONE.</p> <p>END OF STATEMENT</p>			
<b>EXHIBIT</b> H	<b>INITIALS OF PERSON MAKING STATEMENT</b>		<b>PAGE 1 OF</b> <u>1</u> <b>PAGES</b>
<small>ADDITIONAL PAGES MUST CONTAIN THE HEADING "STATEMENT OF ____ TAKEN AT ____ DATED ____ CONTINUED." THE BOTTOM OF EACH ADDITIONAL PAGE MUST BEAR THE INITIALS OF THE PERSON MAKING THE STATEMENT AND BE INITIALED AS "PAGE ____ OF ____ PAGES." WHEN ADDITIONAL PAGES ARE UTILIZED, THE BACK OF PAGE 1 WILL BE LINED OUT, AND THE STATEMENT WILL BE CONCLUDED ON THE REVERSE SIDE OF ANOTHER COPY OF THIS FORM.</small>			

STATEMENT (Continued)  
NOTHING FOLLOWS

AFFIDAVIT

I, STANLEY R. MATTHEWS, HAVE READ OR HAVE HAD READ TO ME THIS STATEMENT WHICH BEGINS ON PAGE 1 AND ENDS ON PAGE 1. I FULLY UNDERSTAND THE CONTENTS OF THE ENTIRE STATEMENT MADE BY ME. THE STATEMENT IS TRUE. I HAVE INITIALED ALL CORRECTIONS AND HAVE INITIALED THE BOTTOM OF EACH PAGE CONTAINING THE STATEMENT. I HAVE MADE THIS STATEMENT FREELY WITHOUT HOPE OF BENEFIT OR REWARD, WITHOUT THREAT OF PUNISHMENT, AND WITHOUT COERCION, UNLAWFUL INFLUENCE, OR UNLAWFUL INDUCEMENT.

\_\_\_\_\_  
(Signature of Person Making Statement)

WITNESSES:

Subscribed and sworn to before me, a person authorized by law to administer oaths, this \_\_\_\_\_ day of \_\_\_\_\_, 19 \_\_\_\_\_ at \_\_\_\_\_

\_\_\_\_\_  
ORGANIZATION OR ADDRESS

\_\_\_\_\_  
(Signature of Person Administering Oath)

\_\_\_\_\_  
(Typed Name of Person Administering Oath)

\_\_\_\_\_  
ORGANIZATION OR ADDRESS

\_\_\_\_\_  
(Authority To Administer Oaths)

INITIALS OF PERSON MAKING STATEMENT

PAGE 1 OF 1 PAGES

USAPPC V2.00



<b>SWORN STATEMENT</b> <small>For use of this form, see AR 190-45; the proponent agency is ODCSOPS</small>			
LOCATION FORT BLANK, VA 22222	DATE 6 NOV 0X	TIME 1000	FILE NUMBER
LAST NAME, FIRST NAME, MIDDLE NAME RUSSEL, JOHN J.	SOCIAL SECURITY NUMBER 234-56-7890		GRADE/STATUS 0-2
ORGANIZATION OR ADDRESS B CO, 1/21ST FA, FORT BLANK, VA 22222			
<p>I, <u>JOHN J. RUSSEL</u>, WANT TO MAKE THE FOLLOWING STATEMENT UNDER OATH:</p> <p>On 6 November 200X, I talked to PFC Marin's Company XO, 1LT Henry A. Rowland. He stated that neither PFC Marin nor PVT Malone had been in other fights and didn't seem to be the type to pick fights. Neither of these soldiers was in any other trouble before their arrival to the best of my knowledge.</p> <div style="text-align: right; margin-top: 100px;">           JOHN J. RUSSEL            1LT, FA            Investigating Officer         </div>			
EXHIBIT I	INITIALS OF PERSON MAKING STATEMENT		PAGE 1 OF <u>1</u> PAGES
<small>           ADDITIONAL PAGES MUST CONTAIN THE HEADING "STATEMENT OF ____ TAKEN AT ____ DATED ____ CONTINUED."            THE BOTTOM OF EACH ADDITIONAL PAGE MUST BEAR THE INITIALS OF THE PERSON MAKING THE STATEMENT AND BE INITIALED AS "PAGE ____ OF ____ PAGES." WHEN ADDITIONAL PAGES ARE UTILIZED, THE BACK OF PAGE 1 WILL BE LINED OUT, AND THE STATEMENT WILL BE CONCLUDED ON THE REVERSE SIDE OF ANOTHER COPY OF THIS FORM.         </small>			

STATEMENT (Continued)

**AFFIDAVIT**

I, \_\_\_\_\_, HAVE READ OR HAVE HAD READ TO ME THIS STATEMENT WHICH BEGINS ON PAGE 1 AND ENDS ON PAGE \_\_\_\_\_. I FULLY UNDERSTAND THE CONTENTS OF THE ENTIRE STATEMENT MADE BY ME. THE STATEMENT IS TRUE. I HAVE INITIALED ALL CORRECTIONS AND HAVE INITIALED THE BOTTOM OF EACH PAGE CONTAINING THE STATEMENT. I HAVE MADE THIS STATEMENT FREELY WITHOUT HOPE OF BENEFIT OR REWARD, WITHOUT THREAT OF PUNISHMENT, AND WITHOUT COERCION, UNLAWFUL INFLUENCE, OR UNLAWFUL INDUCEMENT.

\_\_\_\_\_  
(Signature of Person Making Statement)

WITNESSES:

Subscribed and sworn to before me, a person authorized by law to administer oaths, this \_\_\_\_\_ day of \_\_\_\_\_, 19 \_\_\_\_\_ at \_\_\_\_\_

\_\_\_\_\_  
ORGANIZATION OR ADDRESS

\_\_\_\_\_  
(Signature of Person Administering Oath)

\_\_\_\_\_  
(Typed Name of Person Administering Oath)

\_\_\_\_\_  
ORGANIZATION OR ADDRESS

\_\_\_\_\_  
(Authority To Administer Oaths)

INITIALS OF PERSON MAKING STATEMENT

PAGE OF PAGES

USAPPC V2.00

# **ADMINISTRATIVE AND CIVIL LAW DEPARTMENT BASIC COURSE**

## **DESKBOOK**

### **CHAPTER X**

#### **Investigation Seminar Problem**

##### **1. Introduction:**

a. Judge advocates can serve in several capacities when dealing with an informal investigation under the provisions of AR 15-6. As advisors to the Investigating Officer (IO), judge advocates brief the IO on issues relating to an investigation, help the IO develop an investigative plan, and advise the IO during the investigation on questions such as what the evidence is demonstrating, what further evidence might be helpful and where it could be obtained, and whether there is reason to suspect an individual has committed an offense and should be warned of his rights before questioning. Part I of this exercise will highlight issues for you as a legal advisor.

b. Judge advocates will also be asked to review AR 15-6 reports of investigation (ROI) for legal sufficiency. In your seminar, you will apply your knowledge to a sample AR 15-6 investigation.

##### **2. Assignment:**

a. Part I: Review AR 15-6 provisions relating to informal investigations and AR 600-20, paras 4-14, 4-16, and 6-3 through 6-5. Read the Investigation Guide for Informal Investigations (attached To Chapter J). Read the assignment at Part I. Write down three issues significant issues you believe should be addressed in the legal review. Be ready to turn this list in at the start of the seminar. You should make an extra copy for your use during the seminar.

b. Part II: In the seminar, we will discuss the legal issues and possible resolutions raised by the investigative record in Part I. The greater your familiarity with the investigative record, the more you will get out of the seminar.

**REPORT OF PROCEEDINGS BY INVESTIGATING OFFICER/BOARD OF OFFICERS**

For use of this form, see AR 15-6; the proponent agency is OTJAG

IF MORE SPACE IS REQUIRED IN FILLING OUT ANY PORTION OF THIS FORM, ATTACH ADDITIONAL SHEETS

**SECTION I - APPOINTMENT**Appointed by **DISCOM, 46th Infantry Division (Mechanized, Fort Wahoo, VA 22902)**on 23 October 2000 (Attach inclosure 1: Letter of appointment or summary of oral appointment data.) (See para 3-15, AR 15-6.)**SECTION II - SESSIONS**

The (investigation)(board) commenced at Fort Wahoo, VA at 0800  
(Place) (Time)  
on 23 October 2000 (If a formal board met for more than one session, check here . Indicate in an inclosure the time  
each session began and ended, the place, persons present and absent, and explanation of absences, if any. ) The following persons  
(members, respondents, counsel) were present: (After each name, indicate capacity, e.g., President, Recorder, Member, Legal Advisor)

MAJ Stuart Denver, HQ Co., 21st Forward Support Battalion, FWVA - Inv. Off.

The following persons (members, respondents, counsel) were absent: (Include brief explanation of each absence.) (See paras 5-2 and 5-8a, AR 15-6)

The (investigating officer)(board) finished gathering/hearing evidence at 0800 on 27 October, 2000  
and completed findings and recommendations at 1600 on 2 November 2000  
(Time) (Date)

**SECTION III - CHECKLIST FOR PROCEEDINGS**

A. COMPLETE IN ALL CASES YES NO1 NA2

1	Inclosures (para 3-5, AR 15-6) Are the following inclosed and numbered consecutively with Roman numerals: (Attached in order listed)			
	a. The letter of appointment or a summary of oral appointment date?	X		
	b. Copy of notice to respondent, if any? (See item 9, below)			X
	c. Other correspondence with respondent or counsel, if any?			X
	d. All other written communications to or from the appointing authority?			X
	e. Privacy Act Statements (Certificate, if statement provided orally)?	X		
	f. Explanation by the investigating officer or board of any unusual delays, difficulties, irregularities, or other problems encountered (e.g., absence of material witnesses)?			X
	g. Information as to sessions of a formal board not included on page 1 of this report?			X
	h. Any other significant papers (other than evidence) relating to administrative aspects of the investigation or board?			X

FOOTNOTES: 1 Explain all negative answers on an attached sheet.  
2 Use of the N/A column constitutes a positive representation that the circumstances described in the question did not occur in this investigation or board.

**DA FORM 1574 (FOR EDUCATIONAL USE ONLY-NOT EXACT DUPLICATE )** Page 1 of 4 pages

2	Exhibits (para 3-16, AR 15-6)	YES	NO1	N/A2
	a. Are all items offered (whether or not received) or considered as evidence individually numbered or lettered as	X		

	exhibits and attached to this report?			
	b. Is an index of all exhibits offered to or considered by the investigating officer/board attached before the first exhibit?	X		
	c. Has the testimony/statement of each witness been recorded verbatim or been reduced to written form and attached as an exhibit?	X		
	d. Are copies, descriptions, or depictions ( <i>if substituted for real or documentary evidence</i> ) properly authenticated and is the location of the original evidence indicated?	X		
	e. Are descriptions/diagrams included of locations visited by the investigating officer/board ( <i>para 3-6b, AR 15-6</i> )?			X
	f. Is each written stipulation attached as an exhibit and is each oral stipulation either reduced to writing and made an exhibit or recorded in a verbatim record?			X
	g. If official notice of any matter was taken over the objection or a respondent or counsel, is a statement of the matter of which official notice was taken attached as an exhibit ( <i>para 3-16d, AR 15-6</i> )?			X
3	Was a quorum present when the board voted on findings and recommendations?			X
B	COMPLETE ONLY FOR FORMAL BOARD PROCEEDINGS ( <i>Chapter 5, AR 15-6</i> )			
4	At the initial session, did the record read or determine that all participants had read the letter of appointment?			
5	Was a quorum present at every session of the board ( <i>para 5-2b, AR 15-6</i> )?			
6	Was each absence of any member properly excused ( <i>para 5-2s, AR 15-6</i> )?			
7	Were members, witnesses, reporter, and interpreter sworn, if required ( <i>para 3-1, AR 15-6</i> )			
8	If any members who voted on findings or recommendations were not present when the board received some evidence, does the inclosure describe how they familiarized themselves with that evidence?			
C	COMPLETE ONLY IF A RESPONDENT WAS DESIGNATED ( <i>Section II, Chap. 5, AR 15-6</i> )			
9	Notice to respondents ( <i>para 5-5, AR 15-6</i> ):			
	a. Is the method and date of delivery to the respondent indicated on each letter of notification?			
	b. Was the date of delivery at least five working days prior to the first session of the board?			
	c. Does each letter of notification indicate -			
	(1) the date, hour, and place of the first session of the board concerning that respondent?			
	(2) the matter to be investigated, including specific allegations against the respondent, if any?			
	(3) the respondent's rights with regard to counsel?			
	(4) the name and address of each witness expected to be called by the recorder?			
	(5) the respondent's rights to be present, present evidence, and call witnesses?			
	d. Was the respondent provided a copy of all unclassified documents in the case file?			
	e. If there were classified materials, were respondent and counsel given access & an opportunity to examine them?			
10	If any respondent was designated after proceedings began ( <i>or otherwise was absent during part of proceedings</i> ):			
	a. Was he properly notified ( <i>para 5-5, AR 15-6</i> )?			
	b. Was record of proceedings and evidence received in his absence made available for examination by him and his counsel ( <i>para 5-4c, AR 15-6</i> )?			
11	Counsel ( <i>para 5-6, AR 15-6</i> ):			
	a. Was each respondent represented by counsel?			
	Name and business address of counsel:			
	( <i>If counsel is a lawyer, check here</i> )			
	b. Was respondent's counsel present at all open sessions of the board relating to that respondent?			
	c. If military counsel was requested but not made available, is a copy ( <i>or, if oral, a summary</i> ) of the request and the action taken on it included in the report ( <i>para 5-6b, AR 15-6</i> )?			
12	If respondent challenged the legal advisor or any voting member for lack of impartiality ( <i>para 5-7, AR 15-6</i> ):			
	a. Was the challenge properly denied and by the appropriate officer?			
	b. Did each member successfully challenged cease to participate in the proceedings?			
13	Was the respondent given an opportunity to ( <i>para 5-8a, AR 15-6</i> ):			
	a. Be present with his counsel at all open sessions which deal with any matter which concerns that respondent?			
	b. Examine and object to the introduction of real & documentary evidence, including written statements?			
	c. Object to the testimony of witnesses and cross-examine witnesses other than his own?			
	d. Call witnesses and otherwise introduce evidence?			
	e. Testify as a witness?			
	f. Make or have his counsel make a final statement or argument ( <i>para 5-9, AR 15-6</i> )?			
14	If requested, did the recorder assist the respondent in obtaining evidence in possession of the Government and in arranging for the presence of witnesses ( <i>para 5-8b, AR 15-6</i> )?			
15	Are all of the respondent's requests and objections which were denied indicated in the report of proceedings or in an inclosure or exhibit to it ( <i>para 5-11, AR 15-6</i> )?			

**SECTION IV - FINDINGS** (para 3-10, AR 15-6)

T

he (investigating officer)(board) having carefully considered the evidence, finds:

1. There is insufficient evidence to support the allegation in the 6-BOSS complaint that the chain of command in G Company, 123d FSB does not care about female soldiers.
2. There is insufficient evidence to support the allegation in the 6-BOSS complaint that women soldiers are pulling extra duty more than male soldiers do. In addition, I find there is insufficient evidence to show that the officers in G Company pull any extra duty not required by their duty position and responsibilities.
3. There is insufficient evidence to support the allegation in the 6-BOSS complaint that the women soldiers are not being promoted in G Company. The only evidence of a woman being non-promoted pertains to an officer, not a soldier. That information is purely speculative as the officer has been informed by the battalion commander that she will not be recommended for promotion unless she improves her performance. I find this officer is, at best, an average performer, and given her supervisor's current record of counseling, may not be eligible for promotion to 1LT. This officer is 2LT Atchison.
4. I find that the command climate in G Company supports good performers and eliminates weak or sub-standard performers. I find no evidence of special treatment for men or of poor treatment for women. I have found some evidence of what could be seen as offensive behavior but nothing that makes me conclude it affects the command climate.

---

**SECTION V - RECOMMENDATIONS** (para 3-11, AR 15-6)

In view of the above findings, the (investigating officer)(board) recommends:

1. No further action be taken to respond to the complaint against the chain of command in G, 123d FSB.
2. Reply by endorsement to the SGS that no action is required on the 6-BOSS and close the complaint file.

**SECTION VI - AUTHENTICATION** (para 3-17, AR 15-6)

T

HIS REPORT OF PROCEEDINGS IS COMPLETE AND ACCURATE. (If any voting member or the recorder fails to sign here or in Section VII below, indicate the reason in the space where his signature should appear.):

**Stuart Denver**

\_\_\_\_\_  
(Recorder)

\_\_\_\_\_  
(Investigating Officer) (President)

\_\_\_\_\_  
(Member)

\_\_\_\_\_  
(Member)

\_\_\_\_\_  
(Member)

\_\_\_\_\_  
(Member)

**SECTION VII- MINORITY REPORT** (para 3-13 AR 15-6)

To the extent indicated in Inclosure \_\_\_\_\_, the undersigned do(es) not concur in the findings and recommendations of the board. (In the inclosure, identify by number each finding and/or recommendation in which the dissenting member(s) do(es) not concur. State the reasons for disagreement. Additional/substitute findings and/or recommendations may be included in the inclosure.)

\_\_\_\_\_  
(Member)

\_\_\_\_\_  
(Member)

**SECTION VIII- ACTION BY THE APPOINTING AUTHORITY** (para 2-3-13 AR 15-6)

The findings and recommendations of the (investigating officer)(board) are (approved)(disapproved)(approved with the following exceptions/substitutions). (If the appointing authority returns the proceedings to the investigating officer or board for further proceedings or corrective action, attach that correspondence (or a summary, if oral) as a numbered inclosure.)

FWVX

23 October 2000

MEMORANDUM FOR MAJ Stuart Denver, HQ Co., 21st Forward Support Battalion, Fort Wahoo, VA  
22902-5006

SUBJECT: Appointment as Investigating Officer

1. You are hereby appointed as an investigating officer under the provisions of AR 15-6. You are to investigate complaints of a hostile atmosphere against female soldiers in Company G, 123d Forward Support Battalion.
2. You will conduct your investigation as an informal investigation under AR 15-6 and report your findings no later than 6 November 2000. You will take sworn statements from all witnesses and will submit your findings and recommendations on DA Form 1574. If you suspect any individual of having committed an offense under the Uniform Code of Military Justice, you will inform him of his rights under Article 3, UCMJ.
3. You will obtain a briefing on your duties from the Office of the Staff Judge Advocate at building 5 before commencing your investigation. Refer all legal questions to the OSJA.

FOR THE COMMANDER:

*Earnest T. Grant*

EARNEST T. GRANT  
CPT, TC  
DISCOM Adjutant

Enclosure 1



## *6-BOSS*

### ON THE PULSE OF FORT WAHOO

The Commanding General's *6-BOSS* line received the following inquiry concerning a member of your command:

"The chain of command in G Company, 123d FSB, doesn't care about female soldiers. We are getting assigned to extra duty and getting by on promotions. There is even a really bad leadership atmosphere among the NCOs towards women soldiers."

You should investigate this matter and reply by endorsement to the Commanding General (ATTN: Secretary General Staff) NLT 8 November 2000.

FW Form 101-4

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Enclosure II

**SWORN STATEMENT**

For use of this form, see AR 190-46; the proponent agency is Office of The Deputy Chief of Staff for Personnel

LOCATION Fort Wahoo VA	DATE 27 Oct 00	TIME	FILE NUMBER
LAST NAME, FIRST NAME, MIDDLE NAME Joliet, Tom	SSN 491-99-0494		GRADE/STATUS 1SG

ORGANIZATION OR ADDRESS  
G Company, 123d FSB

I, Tom Joliet, WANT TO MAKE THE FOLLOWING STATEMENT UNDER OATH:

I have been the 1SG of G Co since Dec 1998. The present CO, CPT Boston, assumed command about 5 months ago. In this brief period, the unit has turned around completely. Morale is better; equipment maintenance has greatly improved; and personnel test scores are significantly higher. No disrespect to the former CO, but I would attribute these improvements to CPT Boston's leadership.

I am aware that someone has made a complaint of sexual harassment against CPT Boston, criticizing the "atmosphere" in the unit, claiming that it is hostile to women soldiers - even among the NCOs. I do not have any knowledge of these matters related to the specific allegation, but I can state for a fact that the "atmosphere" in G Co is fine for all soldiers, women included. I checked with the NCOs and no one complained.

This whole things sounds like a lot to do about nothing. I understand that the CO is accused of being sexist because he sometimes refers to female soldiers as "you people." I have heard him use this phrase, and it was obvious he intended no offense. I just think that the person complaining is being overly sensitive. It's unfair to read anything negative into this choice of words. I've called male soldiers a lot worse things during my time in the Army. As an African American, I know how easy it is to jump on a word that someone uses to accuse them of racism. In fact, I often counsel young minority soldiers to resist that temptation. I tell them that, rather than getting bent out of shape over a name, they should look at whether they are being treated fairly and given an equal chance to advance. And it's the same thing for women. They get a fair shake in this unit. Some of them just have to develop a thicker skin.

EXHIBIT A	INITIALS OF PERSON MAKING STATEMENT <b>TJ</b>	PAGE 1 OF <u>2</u> PAGES
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ADDITIONAL PAGES MUST CONTAIN THE HEADING STATEMENT OF \_\_\_\_ TAKEN AT \_\_\_\_ DATED \_\_\_\_ CONTINUED. THE BOTTOM OF EACH ADDITIONAL PAGE MUST BEAR THE INITIALS OF THE PERSON MAKING THE STATEMENT AND BE INITIALED A "PAGE \_\_\_\_ OF \_\_\_\_ PAGES." WHEN ADDITIONAL PAGES ARE UTILIZED, THE BACK OF PAGE 1 WILL BE LINED OUT, AND THE STATEMENT WILL BE CONCLUDED ON THE REVERSE SIDE OF ANOTHER COPY OF THIS FORM.

**DA FORM 2823- FOR EDUCATIONAL USE ONLY - NOT EXACT DUPLICATE**

I was also told that the screen saver on CPT Boston's computer was cited as another example of the so called hostile environment for women that exists in the unit. I am familiar with the screen saver. CPT Boston showed it to me one evening when he and I were working late. The door to his officer was closed and no one else was around. I've only seen it once, but as I recall, it's a silhouette of a nude woman. I could understand the controversy if the thing was out in the open. But the back of CPT Boston's monitor faces the entrance to his office. You can only see the screen from behind his desk. If someone did see it, they probably had no business being back there to begin with. I will admit that something like that can be misunderstood. So it probably would be a good idea for CPT Boston to get rid of it. I've told him as much, and he agreed. It's probably gone by now.

I remember an incident where I had to redo the delegation of authority card for the arms room because the CO signed the wrong block. ----- END OF STATEMENT -----

---

**AFFIDAVIT**


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I, Tom Joliet HAVE READ OR HAVE HAD READ TO ME THIS STATEMENT WHICH BEGINS ON PAGE 1 AND ENDS ON PAGE \_\_\_\_\_. I FULLY UNDERSTAND THE CONTENTS OF THE ENTIRE STATEMENT MADE BY ME. THE STATEMENT IS TRUE. I HAVE INITIALED ALL CORRECTIONS AND HAVE INITIALED THE BOTTOM OF EACH PAGE CONTAINING THE STATEMENT. I HAVE MADE THIS STATEMENT FREELY WITHOUT HOPE OF BENEFIT OR REWARD, WITHOUT THREAT OF PUNISHMENT, AND WITHOUT COERCION, UNLAWFUL INFLUENCE, OR UNLAWFUL INDUCEMENT.

**Tom Joliet**

\_\_\_\_\_  
(Signature of Person Making Statement)

WITNESSES:

Subscribed and sworn to before me, a person authorized by law to administer oaths this 27 day of Oct, 2000  
at Fort Wahoo, VA

ORGANIZATION OR ADDRESS

**Stuart Denver**

\_\_\_\_\_  
(Signature of Person Administering Oath)

Stuart Denver, MAJ, AG

\_\_\_\_\_  
(Typed Name of Person Administering Oath)

ORGANIZATION OR ADDRESS

**15-6 Officer**

\_\_\_\_\_  
(Authority to Administer Oaths)

INITIALS OF PERSON MAKING STATEMENT

PAGE **2** OF **2** PAGES

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**FOR EDUCATIONAL USE ONLY - NOT AN EXACT DUPLICATE**

<b>SWORN STATEMENT</b> For use of this form, see AR 190-46; the proponent agency is Office of The Deputy Chief of Staff for Personnel			
LOCATION Fort Wahoo, VA	DATE 24 Oct 00	TIME	FILE NUMBER
LAST NAME, FIRST NAME, MIDDLE NAME Camden, Gerald T.	SSN 133-00-6772		GRADE/STATUS LTC
ORGANIZATION OR ADDRESS HHC, 123d FSB			
<p>I, <u>Gerald T. Camden</u>, WANT TO MAKE THE FOLLOWING STATEMENT UNDER OATH:</p> <p>I am the battalion commander of the 123d FSB. You asked me to give a statement about some allegations of a hostile sexual harassment atmosphere in G Co., 123d FSB. I have never observed any sexual harassment in Golf or any of my other companies. I do not tolerate such conduct. In fact, no one has ever come to me at all about sexual harassment or a hostile atmosphere. If anyone in my battalion has a problem like that I have an open door policy and will see any soldier for any reason. I have no idea why anyone would go to the 6-BOSS line with that kind of gripe. I think Golf is becoming an outstanding company. Ed Boston is an outstanding commander. I don't believe I have to keep a close eye on him - he gets things done! He has a few problem soldiers but he has been clearing them out. I know about some problems with 2LT Atchison. Ed came to speak with me about Renee just a few weeks ago. She just isn't developing as a real team player in Golf. I talked to her about it and explained that she needed to get squared away ASAP or I would not be recommending she get her 1LT on time. I based this on both CPT Boston's appraisal and on the recent Command Inspection. Her arms room only got a Conditional Go. That is below the standard I have set. I have not looked into the problem, but I am sure that any officer could fix the problem with some effort and teamwork. I have never looked into her personnel file. I do not know what her OBC record was. As far as I am concerned her performance in the real world of the FSB is the key factor in deciding whether she advances or not. I have the utmost respect for Ed Boston. He is hardworking and dedicated. He is the best company commander I have. He took the worst company in the battalion and in only four months turned it into the best. I have no doubts about his ability or judgment. -----END OF STATEMENT----- <b>GTC</b></p>			
EXHIBIT B	INITIALS OF PERSON MAKING STATEMENT <b>GTC</b>		PAGE 1 OF <u>2</u> PAGES
<p><small>ADDITIONAL PAGES MUST CONTAIN THE HEADING STATEMENT OF ____ TAKEN AT ____ DATED ____ CONTINUED. THE BOTTOM OF EACH ADDITIONAL PAGE MUST BEAR THE INITIALS OF THE PERSON MAKING THE STATEMENT AND BE INITIALED A "PAGE ____ OF ____ PAGES." WHEN ADDITIONAL PAGES ARE UTILIZED, THE BACK OF PAGE 1 WILL BE LINED OUT, AND THE STATEMENT WILL BE CONCLUDED ON THE REVERSE SIDE OF ANOTHER COPY OF THIS FORM.</small></p>			

STATEMENT (Continued)

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**AFFIDAVIT**

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I, Gerald T. Camden HAVE READ OR HAVE HAD READ TO ME THIS STATEMENT WHICH BEGINS ON PAGE 1 AND ENDS ON PAGE \_\_\_\_\_. I FULLY UNDERSTAND THE CONTENTS OF THE ENTIRE STATEMENT MADE BY ME. THE STATEMENT IS TRUE. I HAVE INITIALED ALL CORRECTIONS AND HAVE INITIALED THE BOTTOM OF EACH PAGE CONTAINING THE STATEMENT. I HAVE MADE THIS STATEMENT FREELY WITHOUT HOPE OF BENEFIT OR REWARD, WITHOUT THREAT OF PUNISHMENT, AND WITHOUT COERCION, UNLAWFUL INFLUENCE, OR UNLAWFUL INDUCEMENT.

**Gerald T. Camden**

\_\_\_\_\_  
(Signature of Person Making Statement)

WITNESSES:

Subscribed and sworn to before me, a person authorized by law to administer oaths this 24th day of Oct, 2000 at Fort Wahoo, VA

\_\_\_\_\_  
ORGANIZATION OR ADDRESS

**Stuart Denver**

\_\_\_\_\_  
(Signature of Person Administering Oath)

Stuart Denver

\_\_\_\_\_  
(Typed Name of Person Administering Oath)

\_\_\_\_\_  
ORGANIZATION OR ADDRESS

**AR 15-6 Investigator**

\_\_\_\_\_  
(Authority to Administer Oaths)

INITIALS OF PERSON MAKING STATEMENT

PAGE **2** OF **2** PAGES

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**DA FORM 2823 (FOR EDUCATIONAL USE ONLY-NOT EXACT DUPLICATE)**

# SWORN STATEMENT

For use of this form, see AR 190-46; the proponent agency is Office of The Deputy Chief of Staff for Personnel

LOCATION Fort Wahoo VA	DATE 24 Oct 2000	TIME	FILE NUMBER
LAST NAME, FIRST NAME, MIDDLE NAME Englewood, Henry	SSN 268-13-2143		GRADE/STATUS 1LT

ORGANIZATION OR ADDRESS

G Company, 123d FSB

I, Henry Englewood, WANT TO MAKE THE FOLLOWING STATEMENT UNDER OATH:

***I am the Company G Executive Officer. I am responsible for supervising and counseling all of the lieutenants. The commander, CPT Boston, has required me to do monthly counseling on each lieutenant since August. I have worked closely with 2LT Atchison and have observed her performance many times. I have always been pleased. She is bright, articulate, and hardworking. I would be happy to serve with her again. I always gave her good counseling statements. She recently took over the arms room, which had serious record-keeping problems. She came up with a fix for the problems from now on, but the old records are still messed up. She wrote a memo identifying the problem and put it in the arms room files. When the Command Inspection team saw the memo, they gave the arms room a Conditional Go. I don't blame 2LT Atchison for this - I think she did all she could do.***

***CPT Boston has been a good commander and has always treated me fairly. I'm not sure how he gets along with the female soldiers in our unit. I've heard him say that women get pregnant to avoid duty. One time the commander showed me his computer which had a high-resolution screen saver picture of a naked lady. I don't know where he got it, but he showed it to all the male lieutenants and the first sergeant.***

-----END OF STATEMENT-----

EXHIBIT C	INITIALS OF PERSON MAKING STATEMENT <b>HE</b>	PAGE 1 OF <u>2</u> PAGES
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ADDITIONAL PAGES MUST CONTAIN THE HEADING STATEMENT OF \_\_\_\_ TAKEN AT \_\_\_\_ DATED \_\_\_\_ CONTINUED. THE BOTTOM OF EACH ADDITIONAL PAGE MUST BEAR THE INITIALS OF THE PERSON MAKING THE STATEMENT AND BE INITIALED A "PAGE \_\_\_\_ OF \_\_\_\_ PAGES." WHEN ADDITIONAL PAGES ARE UTILIZED, THE BACK OF PAGE 1 WILL BE LINED OUT, AND THE STATEMENT WILL BE CONCLUDED ON THE REVERSE SIDE OF ANOTHER COPY OF THIS FORM.

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**AFFIDAVIT**

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I, Henry Englewood HAVE READ OR HAVE HAD READ TO ME THIS STATEMENT WHICH BEGINS ON PAGE 1 AND ENDS ON PAGE \_\_\_\_\_. I FULLY UNDERSTAND THE CONTENTS OF THE ENTIRE STATEMENT MADE BY ME. THE STATEMENT IS TRUE. I HAVE INITIALED ALL CORRECTIONS AND HAVE INITIALED THE BOTTOM OF EACH PAGE CONTAINING THE STATEMENT. I HAVE MADE THIS STATEMENT FREELY WITHOUT HOPE OF BENEFIT OR REWARD, WITHOUT THREAT OF PUNISHMENT, AND WITHOUT COERCION, UNLAWFUL INFLUENCE, OR UNLAWFUL INDUCEMENT.

***Henry Englewood***

\_\_\_\_\_  
(Signature of Person Making Statement)

WITNESSES:

Subscribed and sworn to before me, a person authorized by law to administer oaths this 24 day of Oct, 2000 at Fort Wahoo, VA

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
ORGANIZATION OR ADDRESS

***Stuart Denver***

\_\_\_\_\_  
(Signature of Person Administering Oath)

Stuart Denver, MAJ, AG

\_\_\_\_\_  
(Typed Name of Person Administering Oath)

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
ORGANIZATION OR ADDRESS

**15-6 Officer**

\_\_\_\_\_  
(Authority to Administer Oaths)

INITIALS OF PERSON MAKING STATEMENT

***HE***

PAGE **2** OF **2** PAGES

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<b>SWORN STATEMENT</b> For use of this form, see AR 190-46; the proponent agency is Office of The Deputy Chief of Staff for Personnel			
LOCATION Fort Wahoo, VA	DATE 24 Oct 2000	TIME	FILE NUMBER
LAST NAME, FIRST NAME, MIDDLE NAME Franklin, Marie	SSN 087-55-9962		GRADE/STATUS 1LT
ORGANIZATION OR ADDRESS   G Co, 123d FSB			
<p>I, <u>Marie Franklin</u>, WANT TO MAKE THE FOLLOWING STATEMENT UNDER OATH:</p> <p>The EO atmosphere in G/123 is not in keeping with the Army's standard. If you aren't a white male, you have to fight for everything you get. I have been assigned to this company for 27 months, ever since I got here from Ordance Officer Basic. CPT Boston is the third company commander I have worked for and he is the worst leader we have had, at least in terms of taking care of his soldiers.</p> <p>Under CPT Houston and LTC Idaho's command, things in G Co weren't too bad. Some of the NCOs had attitude problems about working with women in leadership positions, but with a woman as battalion commander they kept their attitudes to themselves most of the time. When they said something out of line, the 1SG or company commander would correct them.</p> <p>Ever since last summer, things have started to change. CPT Boston took over with a get the job done, no-nonsense attitude. I respect his technical proficiency and understand what he is trying to do with the company, but he has no concept of what he is doing to people. Soldiers work for him out of fear, not out of respect. If you are one of his "good old boys," he jokes with you and lets his guard down a little from time to time. If you aren't part of the in crowd (and all women and all black NCOs are excluded), he is all starch and no nonsense. He tries to maintain a consistent appearance in public, but soldiers are beginning to catch on.</p> <p>During the first few weeks after CPT Boston took over, everybody was working very hard. CPT Boston made comments about "you people" and "those people." At first I thought he was referring to soldiers who worked for him but it soon became clear that "you people" and "those people" were women soldiers. When CPT Boston used the term "soldiers," it was clear he meant male soldiers. During a company officers meeting once, he even said he had a great advantage, that he understood the Army better because of the source of his commission. I didn't realize it at the time, but I learned later he was referring to the fact that he went to the Citadel. When I realized what he was saying, I was furious. What does he think my USMA degree means?</p>			
EXHIBIT  <div style="text-align: center; font-size: 1.2em;">D</div>	INITIALS OF PERSON MAKING STATEMENT  <div style="text-align: center; font-size: 1.2em; font-weight: bold;">MF</div>		PAGE 1 OF <u>5</u> PAGES
<i>ADDITIONAL PAGES MUST CONTAIN THE HEADING STATEMENT OF ____ TAKEN AT ____ DATED ____ CONTINUED. THE BOTTOM OF EACH ADDITIONAL PAGE MUST BEAR THE INITIALS OF THE PERSON MAKING THE STATEMENT AND BE INITIALED A "PAGE ____ OF ____ PAGES." WHEN ADDITIONAL PAGES ARE UTILIZED, THE BACK OF PAGE 1 WILL BE LINED OUT, AND THE STATEMENT WILL BE CONCLUDED ON THE REVERSE SIDE OF ANOTHER COPY OF THIS FORM.</i>			



## STATEMENT (Continued)

During an officer's call last August (right after the battalion change of command?), I asked the new battalion commander about equal opportunity and sexual harassment training. I figured it would be a non-confrontational way of reminding people that women and minority soldiers are professionals who have something to contribute. Was I ever wrong. CPT Boston came down on me like a ton of bricks. During the happy hour at the club which followed the officers call, he ordered me to report to his office that evening after things broke up. When we got to his office, he was furious. He spouted off about me being disloyal and going behind his back and setting LTC Camden up for failure with a blind-sided question. At first I didn't know what he was talking about but then he practically screamed something about "bogus sexual harassment" at me. I was shocked. LTC Idaho and CPT Houston both wanted all of us officers to be totally frank with them and no questions were off limits. CPT Boston was the extreme opposite. He was practically foaming at the mouth. He said if I was so interested in "extra" training, that I could research all of the Army's standardized unit training requirements and brief him on them in one week's time. I couldn't believe it. My main extra duty was being the company Motor Officer. LT Chen, one of our other platoon leaders, is the company Training Officer. Early the following week, when I was working one evening on that briefing, CPT Boston stopped by my office and used a very sarcastic tone of voice to "suggest" that since I was so interested in "training" I use my "extra" time during the evenings when I was at the office to check on the other soldiers who were performing "extra training." I checked with the SDO

## AFFIDAVIT

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WITNESSES:

\_\_\_\_\_  
(Signature of Person Making Statement)

Subscribed and sworn to before me, a person authorized by law to administer oaths this \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_  
at \_\_\_\_\_

\_\_\_\_\_  
ORGANIZATION OR ADDRESS\_\_\_\_\_  
(Signature of Person Administering Oath)\_\_\_\_\_  
ORGANIZATION OR ADDRESS\_\_\_\_\_  
(Typed Name of Person Administering Oath)\_\_\_\_\_  
(Authority to Administer Oaths)INITIALS OF PERSON MAKING STATEMENT **MF**PAGE **2** OF **5** PAGES**DA FORM 2823 (FOR EDUCATIONAL USE ONLY-NOT EXACT DUPLICATE)**

and no soldiers were performing extra training but several were pulling extra duty as Article 15 punishment. I did check in with the NCO who was charged with supervising the soldiers on punishment detail and I asked her if she needed any officer assistance. She said everything was in order so I left it at that.

On the Friday, when I was scheduled to give CPT Boston the training requirements briefing, I reported to his office as ordered. He was working on his computer. He told me to stand by while he finished his document. A couple of minutes later, he said he was ready for the briefing. I told him I had set up the training room for the briefing. He laughed and said I needed to be flexible, that he would take the briefing at his desk. So I excused myself and went to the training room and got the charts I had prepared. When I came back, he told me not to bother with charts, just to give him the details. So I briefed him from my note cards, standing in front of his desk. I could see a reflection of his computer screen in the window behind him. At first the picture looked like a nude woman but whenever CPT Boston bumped into his desk, the mouse moved and the screen changed to what looked like an aircraft control panel. He was visibly impatient and kept looking at this watch. At one point he told me to hurry up or he would miss all of happy hour at the club.

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**AFFIDAVIT**


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WITNESSES:

\_\_\_\_\_  
(Signature of Person Making Statement)

Subscribed and sworn to before me, a person authorized by law to administer oaths this \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_  
at \_\_\_\_\_

\_\_\_\_\_  
ORGANIZATION OR ADDRESS

\_\_\_\_\_  
(Signature of Person Administering Oath)

\_\_\_\_\_  
ORGANIZATION OR ADDRESS

\_\_\_\_\_  
(Typed Name of Person Administering Oath)

\_\_\_\_\_  
(Authority to Administer Oaths)

INITIALS OF PERSON MAKING STATEMENT

**MF**

PAGE **3** OF **5** PAGES

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STATEMENT (Continued)

After these events, I seriously considered filing a formal EO complaint against CPT Boston but decided it wasn't worth the hassle. West Point taught me the Army has lots of individuals who are racist or sexist or both but most of them get what's coming to them sooner or later. I figured putting up with CPT Boston was part of the cost of doing business. I didn't want to admit he was getting to me: I was in the top 25% of my West Point class and Commandants List at Ordnance Officer Basic. I wanted to make the Army a career and feared retribution if I complained.

Things got worse. In Oct, we were getting ready for NTC rotation. At a staff meeting, we were going over our personnel lists and I reminded the CO that PFC Webb, a mechanic, was on profile which prevented her from heavy lifting and from wearing MOPP gear. CPT Boston asked what the profile was for and how long it would last. It was a pregnancy profile and the delivery date wasn't til Feb. He looked right at me and said, "typical woman. That's how you people get out of tough duty: just get pregnant." I was literally speechless and couldn't believe that an officer in today's Army would say such a thing, especially in front of 5 other officers. When I escorted CPT Boston through the motor pool for his change of command inventory, I briefed him on our mechanics, including PFC Webb and her husband who had been trying to have a baby ever since they got to Fort Wahoo. Although the ISG wanted to use PFC Webb as a company clerk during her pregnancy, she volunteered to work in the PLL cage to help the company get ready for the command inspection. She usually has to be ordered to take her required rest breaks and to go home at the end of the medically mandated 8 hour shift. CPT Boston's comment about PFC Webb was uncalled for.

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**AFFIDAVIT**

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WITNESSES:

\_\_\_\_\_  
(Signature of Person Making Statement)

Subscribed and sworn to before me, a person authorized by law to administer oaths this \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_ at \_\_\_\_\_

\_\_\_\_\_  
ORGANIZATION OR ADDRESS

\_\_\_\_\_  
(Signature of Person Administering Oath)

\_\_\_\_\_  
ORGANIZATION OR ADDRESS

\_\_\_\_\_  
(Typed Name of Person Administering Oath)

\_\_\_\_\_  
(Authority to Administer Oaths)

INITIALS OF PERSON MAKING STATEMENT

**MF**

PAGE 4 OF 5 PAGES

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## STATEMENT (Continued)

Last month was the last straw. I went to 2LT Atchison's office after work to see if she was ready to go for a run as planned. Her door was closed and when I went in, I saw she had been crying. I asked her what was the matter and she told me they were going to non-advance her to 1LT. I was furious: 2LT Atchison has worked extremely hard for our company and she has come a long way since she arrived. She's made her share of 2LT mistakes but she gets the job done and really tries to do her best. I think she is way ahead of the other 2LT who arrived from OBC with her. It's complete nonsense to say she is not a "team player." More than any other officer in G, she's here nights and weekends, never complains, and never makes a big deal about problems women have to put up with from CPT Boston. I thought I could put up with difficult individuals you encounter in an Army career but seeing 2LT Atchison treated that way, after everything she's done, made me realize life is too short. She asked me not to tell anyone but I figured someone with authority to change things had to know about what was going on. I called the DISCOM Adjutant and asked to see the commander under his open door policy but the adjutant said I had to tell him the subject, that the commander wanted to know the topic of open door visits. I decided then to use the 6-BOSS complaint. I realize now I can't expect fair treatment from CPT Boston or LTC Camden. When my obligation is up, I plan to resign my commission and look for a job where I'll be judged on what I do, not on my gender or color. ----- END OF STATEMENT -----

## AFFIDAVIT

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**Marie Franklin**

(Signature of Person Making Statement)

WITNESSES:

Subscribed and sworn to before me, a person authorized by law to administer oaths this 24th day of \_\_\_\_ October, 2000 \_\_\_\_ at Fort Wahoo, VA

ORGANIZATION OR ADDRESS

**Stuart Denver**

(Signature of Person Administering Oath)

Stuart Denver

(Typed Name of Person Administering Oath)

ORGANIZATION OR ADDRESS

**AR 15-6 Investigator**

(Authority to Administer Oaths)

INITIALS OF PERSON MAKING STATEMENT

PAGE **5** OF **5** PAGES

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<b>SWORN STATEMENT</b> For use of this form, see AR 190-46; the proponent agency is Office of The Deputy Chief of Staff for Personnel			
LOCATION Fort Wahoo, VA	DATE 26 Oct 2000	TIME	FILE NUMBER
LAST NAME, FIRST NAME, MIDDLE NAME Atchison, Renee	SSN 134-55-6897		GRADE/STATUS 2LT
ORGANIZATION OR ADDRESS G Company, 123d Forward Support Battalion			
<p>I, <u>Renee Atchison</u>, WANT TO MAKE THE FOLLOWING STATEMENT UNDER OATH:</p> <p>I have been assigned to G Co, 123d FSB since Aug 1999. Before coming here, I attended OBC. I was Distinguished Military Graduate of the ROTC program at Wahoo State University.</p> <p>Since May I have been the platoon leader of the Supply &amp; Services Platoon. In July I picked up the Arms Room as an additional duty assignment.</p> <p>My last OER at the time of the change of command was from CPT Ralph Houston, the old company commander. He top-blocked me and recommended I be promoted at the earliest opportunity. The senior rater was LTC Mary Idaho, the old battalion commander. She top blocked me also, commenting I had boundless potential and saying I should be selected for early promotion. She changed command with LTC Camden in September and I have not seen LTC Camden a whole lot.</p> <p>CPT Boston took command in May. The company was not doing very well under the old CO. One of the weak areas was the arms room. I was given charge of the arms room right after the change of command. The CO told me to do whatever it took to square it away. The CO came down on us kind of hard, but I felt like he came down on the women the hardest. I remember one day when 1LT Franklin told the CO that one of her female soldiers was on limited duty because of pregnancy. LT Franklin told him that the female soldier could not go with us to the National Training Center because of the extreme heat and cold out there. Her doctor was concerned because she has premature labor or something. The CO kind of blew up and said "Typical woman, get pregnant to get out of the tough duty - you just can't rely on them." Another time, the XO, 1LT Englewood, told the CO that they had to arrange for port-a-lets for both male and female soldiers during that big exercise, Operation Grand Slam. The post environmental people said a company our size had to have at least three. The XO wanted to designate one for women and two for men but the CO got hot and said "All my portable (well, he used a curse word here but he meant toilets) are for soldiers. I ain't giving special preference to women."</p>			
EXHIBIT E	INITIALS OF PERSON MAKING STATEMENT <b>RA</b>		PAGE 1 OF <u>3</u> PAGES
<p><i>ADDITIONAL PAGES MUST CONTAIN THE HEADING STATEMENT OF ____ TAKEN AT ____ DATED ____ CONTINUED. THE BOTTOM OF EACH ADDITIONAL PAGE MUST BEAR THE INITIALS OF THE PERSON MAKING THE STATEMENT AND BE INITIALED A "PAGE ____ OF ____ PAGES." WHEN ADDITIONAL PAGES ARE UTILIZED, THE BACK OF PAGE 1 WILL BE LINED OUT, AND THE STATEMENT WILL BE CONCLUDED ON THE REVERSE SIDE OF ANOTHER COPY OF THIS FORM.</i></p>			

STATEMENT (Continued)

I was working hard to get ready for our annual command inspection in August. I went to the arms room officer course on post in the middle of July and realized that our accountability paperwork was all messed up. I started working late to fix it. All of the officers started working late but I remember seeing 1LT Franklin working late by herself a whole lot in August. I asked her what she was working on and she said "A special project for the CO." She didn't look very happy. I could not fix the problems in the arms room because the paperwork was messed up in the past. I just put a memorandum for record in the files that we had discovered a defect and would prevent it in the future. It seems the armorer was not signing out the weapons, he was just using the weapons card. Well, the CI team found this problem when they came around in September. The arms room got a conditional GO because the paperwork foul up was a potential No Go area but we caught it ourselves.

I remember a couple of other incidents with CPT Boston. One day, in late July, I was getting the access roster squared away on the arms room and had to get the CO's signature on some "delegation of authority" cards. I took them to his office and gave them to him to sign. He signed in the wrong place and I had to make up new cards. I took them back in and he said, "come around here and show me where to sign." I went around to the back of his desk and pointed to the block at the bottom of the card. While I was there, I caught a glimpse of his computer screen. He has it pointed towards his seat. The screen save was a picture of a nude woman. He noticed me looking at it and pushed his mouse, making the picture go away, and said, "Oh, excuse me." Later that week, we were all working late to get ready for the CI. It was Saturday evening; all the officers had

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**AFFIDAVIT**

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WITNESSES:

\_\_\_\_\_  
(Signature of Person Making Statement)

Subscribed and sworn to before me, a person authorized by law to administer oaths this \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_ at \_\_\_\_\_

\_\_\_\_\_  
ORGANIZATION OR ADDRESS

\_\_\_\_\_  
(Signature of Person Administering Oath)

\_\_\_\_\_  
ORGANIZATION OR ADDRESS

\_\_\_\_\_  
(Typed Name of Person Administering Oath)

\_\_\_\_\_  
(Authority to Administer Oaths)

INITIALS OF PERSON MAKING STATEMENT

**RA**

PAGE **2** OF **3** PAGES

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STATEMENT (Continued)

worked that day on their additional duty areas. It was about 1900 and the mess halls were all closed. The other officers had left about 1830. The CO came to my office and sat on the edge of my desk and asked me to come to dinner with him at the O club. He said afterwards we could go downtown to a movie or something like that. I felt kind of awkward about it since he was married and stuff, and I said I wasn't hungry. He left my office right away. Ever since he has hardly ever spoken to me. Even when I get my monthly counseling, the XO just brings me the statement. They have been kind of bad lately. Before that day, the CO used to come to my office and close the door and sit down and counsel me about my performance. Now I never see him.

About two weeks ago I got called in by LTC Camden. He told me that he was recommending that I not get my 1LT on time. He said it was because I was not performing up to standard. He said I was not a "team player." He added that the other reason was the poor counseling statements and the performance of the arms room on the command inspection. I went back to the company and was really upset. I told LT Franklin about it and she was upset too.

***I have attached copies of the counseling statements from the XO and CO and my last OER.***

----- END OF STATEMENT -----

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**AFFIDAVIT**

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I, Renee Atchison HAVE READ OR HAVE HAD READ TO ME THIS STATEMENT WHICH BEGINS ON PAGE 1 AND ENDS ON PAGE \_\_\_\_\_. I FULLY UNDERSTAND THE CONTENTS OF THE ENTIRE STATEMENT MADE BY ME. THE STATEMENT IS TRUE. I HAVE INITIALED ALL CORRECTIONS AND HAVE INITIALED THE BOTTOM OF EACH PAGE CONTAINING THE STATEMENT. I HAVE MADE THIS STATEMENT FREELY WITHOUT HOPE OF BENEFIT OR REWARD, WITHOUT THREAT OF PUNISHMENT, AND WITHOUT COERCION, UNLAWFUL INFLUENCE, OR UNLAWFUL INDUCEMENT.

***Renee Atchison***

\_\_\_\_\_  
(Signature of Person Making Statement)

WITNESSES:

Subscribed and sworn to before me, a person authorized by law to administer oaths this 26th day of October, 2000 \_\_\_\_\_  
at Fort Wahoo, VA

\_\_\_\_\_  
ORGANIZATION OR ADDRESS

***Stuart Denver***

\_\_\_\_\_  
(Signature of Person Administering Oath)

Stuart Denver

\_\_\_\_\_  
(Typed Name of Person Administering Oath)

\_\_\_\_\_  
ORGANIZATION OR ADDRESS

***AR 15-6 Investigator***

\_\_\_\_\_  
(Authority to Administer Oaths)

INITIALS OF PERSON MAKING STATEMENT

PAGE **3** OF **3** PAGES

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**DA FORM 2823 (FOR EDUCATIONAL USE ONLY-NOT EXACT DUPLICATE)**



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**GENERAL COUNSELING FORM**

For use of this form, see AR 635-200; the proponent agency is MILPERCEN

**DATA REQUIRED BY THE PRIVACY ACT OF 1974**

AUTHORITY: 5 USC 301, 10 USC 3012 (G).

PRINCIPAL PURPOSE: To record counseling data pertaining to service members

ROUTINE USES: Prerequisite counseling under paragraphs 5-8, 5-13, chapters 11, 13 or section III, chapter 14, AR 635-200. May also be used to document failures of rehabilitation efforts in administrative discharge proceedings.

DISCLOSURE: Disclosure is voluntary, but failure to provide the information may result in recording of a negative counseling session indicative of the subordinate's lack of a desire to solve his or her problems.

**PART I - BASIC DATA**

1. NAME <b>ATCHISON, RENEE</b>	2. SOCIAL SECURITY NO.	3. GRADE <b>2LT</b>	4. SEX <b>F</b>
5. UNIT <b>G CO., 123d FSB</b>	FOR TRAINING UNITS ONLY		
	6. WEEK OF TRAINING	7. TRAINING SCORES HIGH ____ MED ____ LOW ____	

**PART II - OBSERVATIONS**

8. DATE AND CIRCUMSTANCES

**MONTHLY COUNSELING - June 2000**

9. DATE AND SUMMARY OF COUNSELING

**The new CO has initiated monthly counseling on all the LTs. I will be counseling you every month on your performance.****1. Keep up the good work in the S&S platoon. Training stats are 93%. The standard is 98%. Keep getting folks out to train.****2. Arms room is looking up. Remember the Command Inspection is coming up.****3. Outstanding job as range OIC on M16 range. Bn Cdr gave us a "huah coin" in recognition.****DISPOSITION INSTRUCTIONS**

This form will be destroyed upon : reassignment (other than rehabilitative transfers), separation at ETS, or upon retirement

**DA FORM 4856 (FOR EDUCATIONAL USE ONLY - NOT AN EXACT DUPLICATE)**

PART III - AUTHENTICATION	
10. NAME, GRADE, SIGNATURE OF COUNSELOR Henry Englewood <i>Henry Englewood</i>	DATE <i>June 2000</i>
11. I acknowledge having been counseled by the above individual and understand the reason for this counseling session. I concur/nonconcur that the information above accurately reflects this counseling session. I nonconcur for the following reasons:  <i>N/A</i>	
12. NAME, GRADE, AND SIGNATURE OF INDIVIDUAL COUNSELED Renee Atchison <i>Renee Atchison</i>	DATE
13. IF COUNSELED INDIVIDUAL REFUSES TO SIGN COUNSELING NOTES, COUNSELOR WILL INITIAL THIS BLOCK	
<b><u>PART IV - REHABILITATION</u></b>	
14. REHABILITATION RESULTS/COMMENTS	
15. NAME, GRADE, SIGNATURE OF INDIVIDUAL COUNSELED	DATE
16. NAME, GRADE, SIGNATURE OF COUNSELOR	DATE
<b><u>PART V - UNIT COMMANDER INTERVIEW</u></b>	
17. INTERVIEW RESULTS AND RECOMMENDATION  <ul style="list-style-type: none"> <li>• <i>Marvelous! Keep up the fight!</i></li> <li>• <i>Golf leads the way!</i></li> </ul>	
18. NAME, GRADE, SIGNATURE OF UNIT COMMANDER <i>EC Boston III</i>	DATE
<b>FOR EDUCATIONAL USE ONLY - NOT AN EXACT DUPLICATE</b>	

**GENERAL COUNSELING FORM**

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**PART I - BASIC DATA**

1. NAME

***ATCHISON, RENEE***

2. SOCIAL SECURITY NO.

3. GRADE

***2LT***

4. SEX

***F***

5. UNIT

***G CO., 123d FSB***FOR TRAINING UNITS ONLY

6. WEEK OF TRAINING

7. TRAINING SCORES

HIGH \_\_\_\_ MED \_\_\_\_ LOW \_\_\_\_

**PART II - OBSERVATIONS**

8. DATE AND CIRCUMSTANCES

***MONTHLY COUNSELING - July 2000***

9. DATE AND SUMMARY OF COUNSELING

***Monthly performance.******1. Arms room is first priority for CI. Keep plugging.******2. S&S platoon vehicle maintenance is up. Your operational readiness rate is over 95% - Great job.******3. Training stats at 95% - 98% is goal.*****DISPOSITION INSTRUCTIONS***This form will be destroyed upon : reassignment (other than rehabilitative transfers), separation at ETS, or upon retirement***DA FORM 4856 (FOR EDUCATIONAL USE ONLY - NOT AN EXACT DUPLICATE)**

PART III - AUTHENTICATION	
10. NAME, GRADE, SIGNATURE OF COUNSELOR Henry Englewood <i><b>Henry Englewood</b></i>	DATE <i><b>July 2000</b></i>
11. I acknowledge having been counseled by the above individual and understand the reason for this counseling session. I concur/nonconcur that the information above accurately reflects this counseling session. I nonconcur for the following reasons:  <i><b>N/A</b></i>	
12. NAME, GRADE, AND SIGNATURE OF INDIVIDUAL COUNSELED Renee Atchison <i><b>Renee Atchison</b></i>	DATE
13. IF COUNSELED INDIVIDUAL REFUSES TO SIGN COUNSELING NOTES, COUNSELOR WILL INITIAL THIS BLOCK	
<b><u>PART IV - REHABILITATION</u></b>	
14. REHABILITATION RESULTS/COMMENTS	
15. NAME, GRADE, SIGNATURE OF INDIVIDUAL COUNSELED	DATE
16. NAME, GRADE, SIGNATURE OF COUNSELOR	DATE
<b><u>PART V - UNIT COMMANDER INTERVIEW</u></b>	
17. INTERVIEW RESULTS AND RECOMMENDATION  <ul style="list-style-type: none"> <li>• <i><b>Remember - All “Go’s” on C.I.!</b></i></li> <li>• <i><b>Doing Great - Big Push Next Month!</b></i></li> </ul>	
18. NAME, GRADE, SIGNATURE OF UNIT COMMANDER <i><b>EC Boston III</b></i>	DATE
<b>FOR EDUCATIONAL USE ONLY - NOT AN EXACT DUPLICATE</b>	

**GENERAL COUNSELING FORM**

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**PART I - BASIC DATA**

1. NAME

*ATCHISON, RENEE*

2. SOCIAL SECURITY NO.

3. GRADE

*2LT*

4. SEX

*F*

5. UNIT

*G CO., 123d FSB**FOR TRAINING UNITS ONLY*

6. WEEK OF TRAINING

7. TRAINING SCORES

HIGH \_\_\_\_ MED \_\_\_\_ LOW \_\_\_\_

**PART II - OBSERVATIONS**

8. DATE AND CIRCUMSTANCES

*MONTHLY COUNSELING - August 2000*

9. DATE AND SUMMARY OF COUNSELING

*Monthly counseling.**1. Appreciate long hours for CI!**2. Training stats at 97% - 1 to go**3. Watch personal affairs - late on 6 Oct because of car trouble.**4. Keep up great work.***DISPOSITION INSTRUCTIONS***This form will be destroyed upon : reassignment (other than rehabilitative transfers), separation at ETS, or upon retirement***DA FORM 4856 (FOR EDUCATIONAL USE ONLY - NOT AN EXACT DUPLICATE)**

PART III - AUTHENTICATION	
10. NAME, GRADE, SIGNATURE OF COUNSELOR Henry Englewood <b><i>Henry Englewood</i></b>	DATE <b><i>Aug 2000</i></b>
11. I acknowledge having been counseled by the above individual and understand the reason for this counseling session. I concur/nonconcur that the information above accurately reflects this counseling session. I nonconcur for the following reasons:  <div style="padding-left: 20px;"><i>N/A</i></div>	
12. NAME, GRADE, AND SIGNATURE OF INDIVIDUAL COUNSELED Renee Atchison <b><i>Renee Atchison</i></b>	DATE
13. IF COUNSELED INDIVIDUAL REFUSES TO SIGN COUNSELING NOTES, COUNSELOR WILL INITIAL THIS BLOCK	
<b><u>PART IV - REHABILITATION</u></b>	
14. REHABILITATION RESULTS/COMMENTS	
15. NAME, GRADE, SIGNATURE OF INDIVIDUAL COUNSELED	DATE
16. NAME, GRADE, SIGNATURE OF COUNSELOR	DATE
<b><u>PART V - UNIT COMMANDER INTERVIEW</u></b>	
17. INTERVIEW RESULTS AND RECOMMENDATION  <div style="padding-left: 20px;"> <ul style="list-style-type: none"> <li>• <b><i>Must improve now - Marginal overall</i></b></li> <li>• <b><i>Get on team for C.I.!</i></b></li> <li>• <b><i>No "No Go" is acceptable. Shape up.</i></b></li> </ul> </div>	
18. NAME, GRADE, SIGNATURE OF UNIT COMMANDER <b><i>EC Boston III</i></b>	DATE
<b>FOR EDUCATIONAL USE ONLY - NOT AN EXACT DUPLICATE</b>	

**GENERAL COUNSELING FORM**

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**PART I - BASIC DATA**

1. NAME

***ATCHISON, RENEE***

2. SOCIAL SECURITY NO.

3. GRADE

***2LT***

4. SEX

***F***

5. UNIT

***G CO., 123d FSB******FOR TRAINING UNITS ONLY***

6. WEEK OF TRAINING

7. TRAINING SCORES

HIGH \_\_\_\_ MED \_\_\_\_ LOW \_\_\_\_

**PART II - OBSERVATIONS**

8. DATE AND CIRCUMSTANCES

***MONTHLY COUNSELING - September 2000***

9. DATE AND SUMMARY OF COUNSELING

***Monthly performance review.******1. Thanks for top job on CI. Make sure the "Conditional Go" in Arms room does not happen next year - you did your best.******2. Training at 98% - Made it - Huah!******3. Thanks for good vehicle maintenance effort. You helped S&T platoon pass CI. Great.*****DISPOSITION INSTRUCTIONS***This form will be destroyed upon : reassignment (other than rehabilitative transfers), separation at ETS, or upon retirement***DA FORM 4856 (FOR EDUCATIONAL USE ONLY - NOT AN EXACT DUPLICATE)**



PART III - AUTHENTICATION	
10. NAME, GRADE, SIGNATURE OF COUNSELOR Henry Englewood <i>Henry Englewood</i>	DATE <i>Sept 2000</i>
11. I acknowledge having been counseled by the above individual and understand the reason for this counseling session. I concur/nonconcur that the information above accurately reflects this counseling session. I nonconcur for the following reasons:  <i>N/A</i>	
12. NAME, GRADE, AND SIGNATURE OF INDIVIDUAL COUNSELED Renee Atchison <i>Renee Atchison</i>	DATE
13. IF COUNSELED INDIVIDUAL REFUSES TO SIGN COUNSELING NOTES, COUNSELOR WILL INITIAL THIS BLOCK	
<b>PART IV - REHABILITATION</b>	
14. REHABILITATION RESULTS/COMMENTS	
15. NAME, GRADE, SIGNATURE OF INDIVIDUAL COUNSELED	DATE
16. NAME, GRADE, SIGNATURE OF COUNSELOR	DATE
<b>PART V - UNIT COMMANDER INTERVIEW</b>	
17. INTERVIEW RESULTS AND RECOMMENDATION  <ul style="list-style-type: none"> <li>• <i>I disagree with XO. Arms room is unacceptable.</i></li> <li>• <i>My standard is 100% - No slack in training. 1.5% dead is still DEAD!</i></li> <li>• <i>Fix NOW!</i></li> </ul>	
18. NAME, GRADE, SIGNATURE OF UNIT COMMANDER <i>EC Boston III</i>	DATE
<b>FOR EDUCATIONAL USE ONLY - NOT AN EXACT DUPLICATE</b>	

**GENERAL COUNSELING FORM**

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**PART I - BASIC DATA**

1. NAME <b>ATCHISON, RENEE</b>	2. SOCIAL SECURITY NO.	3. GRADE <b>2LT</b>	4. SEX <b>F</b>
5. UNIT <b>G CO., 123d FSB</b>	FOR TRAINING UNITS ONLY		
	6. WEEK OF TRAINING	7. TRAINING SCORES HIGH ____ MED ____ LOW ____	

**PART II - OBSERVATIONS**

8. DATE AND CIRCUMSTANCES

**MONTHLY COUNSELING - October 2000**

9. DATE AND SUMMARY OF COUNSELING

**Monthly performance review****1. I think you are on the right track. You need to cultivate role as team player.****2. Platoon maintenance down to 93%. Let's get it back to 98%****DISPOSITION INSTRUCTIONS***This form will be destroyed upon : reassignment (other than rehabilitative transfers), separation at ETS, or upon retirement***DA FORM 4856 (FOR EDUCATIONAL USE ONLY - NOT AN EXACT DUPLICATE)**

PART III - AUTHENTICATION	
10. NAME, GRADE, SIGNATURE OF COUNSELOR Henry Englewood <i>Henry Englewood</i>	DATE <i>Oct 2000</i>
11. I acknowledge having been counseled by the above individual and understand the reason for this counseling session. I concur/nonconcur that the information above accurately reflects this counseling session. I nonconcur for the following reasons:  <i>N/A</i>	
12. NAME, GRADE, AND SIGNATURE OF INDIVIDUAL COUNSELED Renee Atchison <i>Renee Atchison</i>	DATE
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<b>PART IV - REHABILITATION</b>	
14. REHABILITATION RESULTS/COMMENTS	
15. NAME, GRADE, SIGNATURE OF INDIVIDUAL COUNSELED	DATE
16. NAME, GRADE, SIGNATURE OF COUNSELOR	DATE
<b>PART V - UNIT COMMANDER INTERVIEW</b>	
17. INTERVIEW RESULTS AND RECOMMENDATION  <ul style="list-style-type: none"> <li>• <i>Performance not improving - Maintenance stats an indicator of overall duty: down.</i></li> <li>• <i>I am very disappointed and will be talking to the battalion commander.</i></li> </ul>	
18. NAME, GRADE, SIGNATURE OF UNIT COMMANDER <i>EC Boston III</i>	DATE
<b>FOR EDUCATIONAL USE ONLY - NOT AN EXACT DUPLICATE</b>	

PART I - ADMINISTRATIVE DATA												
a. LAST NAME, FIRST NAME, MIDDLE INITIAL <b>Atchison, Renee</b>			b. SSN <b>134-55-6879</b>		c. GRADE <b>2LT</b>	d. DATE <b>98</b>	OF <b>06</b>	RANK <b>06</b>	e. BR <b>QM</b>	f. designated specialties <b>92A</b>	g. PMOS	h. STA CODE <b>13026</b>
i. UNIT, ORGANIZATION, STATION, ZIP CODE OR APO, MAJOR COMMAND <b>G Company, 123d FSB, 46th ID (Mech), Fort Wahoo, VA 22902 FORSCOM</b>						j. REASON FOR SUBMISSION <b>03 Change of Rater</b>				k. CMD CODE		
l. PERIOD COVERED FROM THRU Year Month Day Year Month Day <b>99 05 17 00 05 16</b>			m. NO. OF MONTHS <b>6</b>		n. MILPO CODE <b>FC37</b>	o. RATED OFFICER COPY (check one and date) <input checked="" type="checkbox"/> 1. GIVEN TO OFFICER <input type="checkbox"/> 2. FORWARDED TO OFFICER			p. FORWARDING ADDRESS			
q. EXPLANATION OF NONRATED PERIODS												
PART II - AUTHENTICATION (Rated officer signature verifies PART I data and RATING OFFICIALS ONLY)												
a. NAME OF RATER (Last, First, MI) <b>Houston, Ralph</b>					SSN <b>119-55-0923</b>		SIGNATURE <b>Ralph Houston</b>					
GRADE, BRANCH, ORGANIZATION, DUTY ASSIGNMENT <b>CPT, TC, Company G, 123d FSB, 46th ID(M), Fort Wahoo, VA 22902</b>										DATE <b>22 May 2000</b>		
b. NAME OF INTERMEDIATE RATER (Last, First, MI)					SSN		SIGNATURE					
GRADE, BRANCH, ORGANIZATION, DUTY ASSIGNMENT										DATE		
c. NAME OF SENIOR RATER (Last, First, MI) <b>Idaho, Mary J.</b>					SSN <b>596-55-0983</b>		SIGNATURE <b>Mary J. Idaho</b>					
GRADE, BRANCH, ORGANIZATION, DUTY ASSIGNMENT <b>LTC(P), QM, HHC 123d FSB, 46th ID(M), Fort Wahoo, VA 22902</b>										DATE <b>7 June 2000</b>		
d. SIGNATURE OF RATED OFFICER <b>Renee Atchison</b>					DATE <b>10 June 00</b>		e. DATE ENTERED ON DA 27-1 <b>16 May 2000</b>	f. RATED OFFICER MPO INITIALS	g. SR MPO INITIALS	h. NO. OF INCL		
PART III - DUTY DESCRIPTION (Rater)												
a. PRINCIPAL DUTY TITLE <b>Supply and Service Platoon Leader</b>							b. SSI/MOS <b>92A005</b>					
c. REFER TO PART IIIa, DA FORM 67-8-1 Serves as platoon leader of supply and service platoon in General Support company of FSB. Responsible for general supply and service support within the brigade rear. Responsible for timely and accurate ordering and delivery of all classes of supply within the BSA. Responsible for maintenance of all platoon vehicles. Serves in additional duty areas of vector control officer, voting officer, unit tax officer and unit morale and welfare officer.												
PART IV - PERFORMANCE EVALUATION - PROFESSIONALISM (Rater)												
a. PROFESSIONAL COMPETENCE (In lines 1 through 14 below, indicate the degree of agreement with the following statements as being descriptive of the rated officer. Any comments will be reflected in b below.) <div style="float: right; text-align: center;">             HIGH DEGREE ← LOW DEGREE              1      2      3      4      5           </div>												
1. Possesses capacity to acquire knowledge/grasp concepts					1	8. Displays sound judgment					1	
2. Demonstrates appropriate knowledge and expertise in assigned tasks					1	9. Seeks self-improvement					1	
3. Maintains appropriate level of physical fitness. <b>PASS 0200</b>					1	10. Is adaptable to changing situations					1	
4. Motivates, challenges and develops subordinates					1	11. Sets and enforces high standards					1	
5. Performs under physical and mental stress					1	12. Possesses military bearing and appearance <b>66/127 YES</b>					1	
6. Encourages candor and frankness in subordinates					1	13. Supports EO/EEO					1	
7. Clear and concise in written communication					1	14. Clear and concise in oral communication					1	
b. PROFESSIONAL ETHICS (Comment on any area where the rated officer is particularly outstanding or needs improvement)												
1. DEDICATION 2. RESPONSIBILITY 3. LOYALTY 4. DISCIPLINE 5. INTEGRITY 6. MORAL COURAGE 7. SELFLESSNESS 8. MORAL STANDARDS		a.3 Is physically fit - scored 300 on the APFT. a.8 Displayed outstanding judgment on FTX "Operation Home Run" by personally securing lost equipment. b.1 Dedicated to troops and duty. A caring leader b.8 Displays highest personal standards of ethics.										
DA FORM 67-8 FOR EDUCATIONAL USE ONLY - NOT EXACT DUPLICATE												

**PART V - PERFORMANCE AND POTENTIAL EVALUATION** (*Rater*)

**PART V - PERFORMANCE AND POTENTIAL EVALUATION** *(Rater)*

a. RATED OFFICER'S NAME Atchison, Renee SSN 134-55-6879  
 RATED OFFICER IS ASSIGNED IN ONE OF HIS/HER DESIGNATED SPECIALTIES/MOS X YES      NO

b. PERFORMANCE DURING THIS RATING PERIOD. REFER TO PART III, DA FORM 67-8 AND PART III a. b. and c., DA FORM 67-8-1

<input checked="checked" type="checkbox"/> ALWAYS EXCEEDED REQUIREMENTS	<input type="checkbox"/> USUALLY EXCEEDED REQUIREMENTS	<input type="checkbox"/> MET REQUIREMENTS	<input type="checkbox"/> OFTEN FAILED REQUIREMENTS	<input type="checkbox"/> USUALLY FAILED REQUIREMENTS
---	--	---	--	--

c. COMMENT ON SPECIFIC ASPECTS OF THE PERFORMANCE. REFER TO PART III, DA FORM 67-8 AND PART III a. b. and c., DA FORM 67-8-1. DO NOT USE FOR COMMENTS ON POTENTIAL.

2LT Atchison is a bright young officer. She has exceeded my every expectation as platoon leader of the Supply and Service platoon. She quickly established herself as an integral part of the unit, winning praise from the supported brigade S-4. 2LT Atchison's emphasis on teamwork resulted in a thoroughly combat ready platoon. She instituted a cross-training program in which soldiers with different supply MOS designations could cross-train in other MOS areas. This resulted in an increase in requisition request processing throughout the unit. This outstanding officer was selected to train Reserve Component supply personnel during the Division's annual summer "Partnership in Training" program with the division round-out brigade. She planned, coordinated, and executed a dynamic program of instruction that ensured that all supply personnel in the round-out brigade were fully capable of supporting the 3d Brigade if activated. She performed with equal brilliance in the additional duty areas of vector control officer, voting officer and unit tax officer. She is clearly an outstanding performer.

d. THIS OFFICER'S POTENTIAL FOR PROMOTION TO THE NEXT HIGHER GRADE IS

☒ PROMOTE AHEAD OF CONTEMPORARIES      ☐ PROMOTE WITH CONTEMPORARIES      ☐ DO NOT PROMOTE      ☐ OTHER (Explain below)

e. COMMENT ON POTENTIAL

Promote this officer at the earliest opportunity. She must be given the opportunity to serve as a company executive officer at the earliest opportunity. This officer has the potential to go very far in the Army. Cultivate and groom her for command.

## **PART VI - INTERMEDIATE RATER**

---

a. COMMENTS

## PART VII - SENIOR RATER

a. **POTENTIAL EVALUATION** (See Chapter 4, AR 635-1-5

SR

DA  
USE ONLY

The diagram shows a 10-story building with a central core and two wings. The left wing is marked with an 'X' and labeled 'HI' (High Impact). The right wing is labeled 'LO' (Low Impact). The building is divided into 10 horizontal sections. The top section is labeled '3', the second '8', the third '5', and the fourth '2'. The bottom section is labeled 'LO'.

A COMPLETED DA FORM 67-8-1 WAS RECEIVED WITH THIS REPORT AND CONSIDERED IN MY EVALUATION AND REVIEW

X      YES      NO (*Explain in b*)

b. COMMENTS I could not be more pleased with the start that 2LT Renee Atchison has made in the Army. This bright young officer has established herself as a key player in this battalion. Her rapid acceptance of critical responsibility with the company and battalion has far surpassed her peers. On a recent field exercise, she personally secured some high value equipment that had been lost from a convoy. She stayed at her post and sent for assistance thus ensuring continued accountability of the equipment. She was one of only two lieutenants from the entire DISCOM selected to teach reserve component personnel this summer. This officer has boundless potential. Select her for early promotion and send her to the advanced course.

DA FORM 67 - 1 (FOR EDUCATIONAL USE ONLY - NOT EXACT DUPLICATE)

**SWORN STATEMENT**

For use of this form, see AR 190-46; the proponent agency is Office of The Deputy Chief of Staff for Personnel

LOCATION Fort Wahoo, Va	DATE 27 Oct 00	TIME	FILE NUMBER
LAST NAME, FIRST NAME, MIDDLE NAME Boston, Edward C. III	SSN 573-99-8877		GRADE/STATUS CPT

ORGANIZATION OR ADDRESS

G Company, 123d FSB

I, Edward C. Boston III, WANT TO MAKE THE FOLLOWING STATEMENT UNDER OATH:

Questions: MAJ DENVER

Answers: CPT BOSTON

Q. How long have you been the commander?

A. About 5 months.

Q. How big is your company?

A. The authorized strength is 115. There are 108 assigned.

Q. How many females are in you unit?

A. There are two female LTs and 28 female NCO/soldiers.

Q. Have there been any complaints made to you about sexual harassment?

A. None prior to this. Everyone works very well together.

Q. Do you have a screen saver in your office?

A. Yes I have one on my computer.

Q. Describe it.

A. It shows a girl in a bikini and the top falls off.

Q. Has anyone seen this screen saver?

A. Yes. The 1SG and some of the LTs have seen it. It is not something that is on display. The only way to see it is to come behind my desk. I normally don't let people back there.

Q. Did LT Atchison ever see it?

A. She might have on one occasion. It came on unexpectedly when she was briefing me on something. As soon as I saw it, I hit the mouse to make it go away.

Q. Have any of the other female soldiers seen it?

A. No.

Q. Can a reflection of it be seen in your office window?

A. I don't have a window in my office.

EXHIBIT

E

INITIALS OF PERSON MAKING STATEMENT

**ECB**PAGE 1 OF 6 PAGES

ADDITIONAL PAGES MUST CONTAIN THE HEADING STATEMENT OF \_\_\_\_ TAKEN AT \_\_\_\_ DATED \_\_\_\_ CONTINUED. THE BOTTOM OF EACH ADDITIONAL PAGE MUST BEAR THE INITIALS OF THE PERSON MAKING THE STATEMENT AND BE INITIALED A "PAGE \_\_\_\_ OF \_\_\_\_ PAGES." WHEN ADDITIONAL PAGES ARE UTILIZED, THE BACK OF PAGE 1 WILL BE LINED OUT, AND THE STATEMENT WILL BE CONCLUDED ON THE REVERSE SIDE OF ANOTHER COPY OF THIS FORM.

Q. How often are the LTs in your unit counseled?

A. Monthly by the XO.

Q. Do you counsel the officers personally?

A. Sometimes.

Q. Where do these counseling take place?

A. It depends on the reason for the counseling. Sometimes it is done at the work site, sort of an on-the-spot-correction. Other times it is more formal and I use the office.

Q. Do you ever counsel LTs in their office?

A. Sometimes. But they don't all have personal offices where we can shut the door and have privacy.

Q. Are the female LTs counseled differently than the males?

A. No.

Q. Do you ever counsel male LTs in your office.

A. Yes.

Q. Do you remember LT Franklin asking about sexual harassment during an officers call?

A. Yes. She embarrassed me and the Battalion Commander. The Battalion commander was fairly new at the time and this was more of a get acquainted session. Out of the blue she asks this question about training on sexual harassment. I talked to her later about it and had her research training requirements.

Q. Was she being punished for asking about sexual harassment?

A. No. There was nothing wrong with the question. The problem was the timing and forum where she asked the question.

---

**AFFIDAVIT**

I, \_\_\_\_\_ HAVE READ OR HAVE HAD READ TO ME THIS STATEMENT WHICH BEGINS ON PAGE 1 AND ENDS ON PAGE \_\_\_\_\_. I FULLY UNDERSTAND THE CONTENTS OF THE ENTIRE STATEMENT MADE BY ME. THE STATEMENT IS TRUE. I HAVE INITIALED ALL CORRECTIONS AND HAVE INITIALED THE BOTTOM OF EACH PAGE CONTAINING THE STATEMENT. I HAVE MADE THIS STATEMENT FREELY WITHOUT HOPE OF BENEFIT OR REWARD, WITHOUT THREAT OF PUNISHMENT, AND WITHOUT COERCION, UNLAWFUL INFLUENCE, OR UNLAWFUL INDUCEMENT.

WITNESSES:

\_\_\_\_\_  
(Signature of Person Making Statement)

Subscribed and sworn to before me, a person authorized by law to administer oaths this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_\_  
at \_\_\_\_\_

\_\_\_\_\_  
ORGANIZATION OR ADDRESS

\_\_\_\_\_  
(Signature of Person Administering Oath)

\_\_\_\_\_  
ORGANIZATION OR ADDRESS

\_\_\_\_\_  
(Typed Name of Person Administering Oath)

\_\_\_\_\_  
(Authority to Administer Oaths)

INITIALS OF PERSON MAKING STATEMENT **ECB**

PAGE **2** OF **6** PAGES

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**DA FORM 2823 (FOR EDUCATIONAL USE ONLY-NOT EXACT DUPLICATE)**

Q. Did LT Franklin have to perform extra duty in addition to the research?

A. No.

Q. Did you require her to supervise soldiers performing extra duty?

A. No. I asked her to check on the extra duty soldiers. That is not performing extra duty. It is something I would expect any officer to do on their own if they were in the company area after normal duty hours. I frequently stop in after duty hours to check on soldiers. I expect my officers and NCOs to do the same.

Q. Did you intend for LT Franklin to have to work late in order to get the research done?

A. I expected her to work as long as necessary to get the job done. That attitude of only working during normal duty hours was one of the reasons that this company was so screwed up when I took over. I want her to understand that this is not an 8-5 job - especially for officers. Several of the officers and NCOs were not happy when I took over and put out the message that we will work until the job is done, even if that means all night in some cases. I don't think LT Franklin was or is completely happy with that.

Q. What about LT Atchison, how is she doing?

A. She is an average performer. I was disappointed with the recent results in the inspection. I thought she could have put more effort into fixing the problem.

---

**AFFIDAVIT**

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I, \_\_\_\_\_ HAVE READ OR HAVE HAD READ TO ME THIS STATEMENT WHICH BEGINS ON PAGE 1 AND ENDS ON PAGE \_\_\_\_\_. I FULLY UNDERSTAND THE CONTENTS OF THE ENTIRE STATEMENT MADE BY ME. THE STATEMENT IS TRUE. I HAVE INITIALED ALL CORRECTIONS AND HAVE INITIALED THE BOTTOM OF EACH PAGE CONTAINING THE STATEMENT. I HAVE MADE THIS STATEMENT FREELY WITHOUT HOPE OF BENEFIT OR REWARD, WITHOUT THREAT OF PUNISHMENT, AND WITHOUT COERCION, UNLAWFUL INFLUENCE, OR UNLAWFUL INDUCEMENT.

WITNESSES:

\_\_\_\_\_  
(Signature of Person Making Statement)

Subscribed and sworn to before me, a person authorized by law to administer oaths this \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_ at \_\_\_\_\_

\_\_\_\_\_  
ORGANIZATION OR ADDRESS

\_\_\_\_\_  
(Signature of Person Administering Oath)

\_\_\_\_\_  
ORGANIZATION OR ADDRESS

\_\_\_\_\_  
(Typed Name of Person Administering Oath)

\_\_\_\_\_  
(Authority to Administer Oaths)

INITIALS OF PERSON MAKING STATEMENT **ECB**

PAGE **3** OF **6** PAGES

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**DA FORM 2823 (FOR EDUCATIONAL USE ONLY-NOT EXACT DUPLICATE)**

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Q. Did you recommend that she not be promoted to 1LT?

A. Yes. Part of the reason that I told the Battalion commander that I would not recommend her now was to get her attention. The Battalion Commander told her that she had a couple months to get her act together before a final decision would be made. I want to see how she deals with this and how her attitude is before I make a final recommendation.

Q. Have you treated her any different because she is a female?

A. I don't think so. I got the impression that the prior chain of command, especially the battalion commander, gave the female LTs a little more of a break. I don't do that. Everyone is expected to perform to the same standard. If they can't do the job then I will get rid of them.

Q. Has LT Atchison failed to perform to the standard?

A. I think so. She needs more maturity. She needs to show more initiative. She is technically competent but that is only part of being an officer. Part of it is a judgment call on my part based on what I've seen over the last few months. I think her performance has leveled off and even declined in the last couple of months. I haven't seen the growth and improvement that I expected.

Q. Have you treated any of the females in the unit differently?

A. Not differently then the males. It may be different then the prior chain of command.

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**AFFIDAVIT**

I, \_\_\_\_\_ HAVE READ OR HAVE HAD READ TO ME THIS STATEMENT WHICH BEGINS ON PAGE 1 AND ENDS ON PAGE \_\_\_\_\_. I FULLY UNDERSTAND THE CONTENTS OF THE ENTIRE STATEMENT MADE BY ME. THE STATEMENT IS TRUE. I HAVE INITIALED ALL CORRECTIONS AND HAVE INITIALED THE BOTTOM OF EACH PAGE CONTAINING THE STATEMENT. I HAVE MADE THIS STATEMENT FREELY WITHOUT HOPE OF BENEFIT OR REWARD, WITHOUT THREAT OF PUNISHMENT, AND WITHOUT COERCION, UNLAWFUL INFLUENCE, OR UNLAWFUL INDUCEMENT.

WITNESSES:

\_\_\_\_\_  
(Signature of Person Making Statement)

Subscribed and sworn to before me, a person authorized by law to administer oaths this \_\_\_\_ day of \_\_\_\_\_, 19 \_\_\_\_  
at \_\_\_\_\_

\_\_\_\_\_  
ORGANIZATION OR ADDRESS

\_\_\_\_\_  
(Signature of Person Administering Oath)

\_\_\_\_\_  
ORGANIZATION OR ADDRESS

\_\_\_\_\_  
(Typed Name of Person Administering Oath)

\_\_\_\_\_  
(Authority to Administer Oaths)

INITIALS OF PERSON MAKING STATEMENT **ECB**

PAGE **4** OF **6** PAGES

**DA FORM 2823 (FOR EDUCATIONAL USE ONLY-NOT EXACT DUPLICATE)**

STATEMENT (Continued)

Q. How would you describe the attitude of your unit towards women?

A. I'm not sure I understand the question. Everyone is treated fairly. But, this is no cake walk. This is a unit that can be deployed on short notice to support a Mechanized Infantry Brigade. I am not going to have people in the unit that can't perform that mission.

Q. Do you think the screen saver is offensive to women?

A. I hadn't really thought about that since they don't see it. If it is a problem, I'll take it off the computer.

Q. Do you think women can perform the mission your unit has?

A. Yes. Those that want to can. I get frustrated when someone can't deploy. I don't think it's fair to the other soldiers.

Q. Do you ever make comments about female soldiers who become pregnant?

A. I may have. Like I said, it is mostly just frustration on my part. If I did say anything it would only be to the chain of command. There is nothing I can do about it. If a soldier is pregnant and can't deploy, we just have to get someone else to go in her place. Luckily it hasn't happened in an area where there is no back-up.

Q. Do you think your comments could be viewed as hostile towards women?

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**AFFIDAVIT**

I, \_\_\_\_\_ HAVE READ OR HAVE HAD READ TO ME THIS STATEMENT WHICH BEGINS ON PAGE 1 AND ENDS ON PAGE \_\_\_\_\_. I FULLY UNDERSTAND THE CONTENTS OF THE ENTIRE STATEMENT MADE BY ME. THE STATEMENT IS TRUE. I HAVE INITIALED ALL CORRECTIONS AND HAVE INITIALED THE BOTTOM OF EACH PAGE CONTAINING THE STATEMENT. I HAVE MADE THIS STATEMENT FREELY WITHOUT HOPE OF BENEFIT OR REWARD, WITHOUT THREAT OF PUNISHMENT, AND WITHOUT COERCION, UNLAWFUL INFLUENCE, OR UNLAWFUL INDUCEMENT.

WITNESSES:

\_\_\_\_\_  
(Signature of Person Making Statement)

Subscribed and sworn to before me, a person authorized by law to administer oaths this \_\_\_\_\_ day of \_\_\_\_\_, 19 \_\_\_\_\_ at \_\_\_\_\_

\_\_\_\_\_  
ORGANIZATION OR ADDRESS

\_\_\_\_\_  
(Signature of Person Administering Oath)

\_\_\_\_\_  
ORGANIZATION OR ADDRESS

\_\_\_\_\_  
(Typed Name of Person Administering Oath)

\_\_\_\_\_  
(Authority to Administer Oaths)

INITIALS OF PERSON MAKING STATEMENT **ECB**

PAGE **5** OF **6** PAGES

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**DA FORM 2823 (FOR EDUCATIONAL USE ONLY-NOT EXACT DUPLICATE)**

STATEMENT (Continued)

A. No. If I made a comment about a soldier being nondeployable that would be the end of it. I would not hold that against anyone. The soldiers all know that I will treat them fairly if they do the job.

Q. What if they can't do the job because of pregnancy?

A. That's not what I meant. Pregnant soldiers still do a job. It may not be on a deployment, but I don't punish them for that.

Q. Do you ever refer to female soldiers as "you people"?

A. I may have. It is a term I use often when referring to a group of people, male or female. I frequently say things like "You people need to get your act together." It is not limited to female soldiers.

Q. Did you ever refer to females as "you people" when talking about latrines in the field?

A. I may have. Part of the unit was going to the field and some asked about making one of the latrines - Female only. I said that I didn't think we needed to make any special arrangements. The latrines were Porta-johns. They had doors with locks on them.

Q. Is there any thing else you want to add?

A. I don't think there is a problem in my company. There are a few people who are unhappy with the fact that they have to work harder now and can't slide the way they did before. I don't think I've done anything wrong. -----END OF STATEMENT-----

---

**AFFIDAVIT**

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I, Edward C. Boston III HAVE READ OR HAVE HAD READ TO ME THIS STATEMENT WHICH BEGINS ON PAGE 1 AND ENDS ON PAGE \_\_\_\_\_. I FULLY UNDERSTAND THE CONTENTS OF THE ENTIRE STATEMENT MADE BY ME. THE STATEMENT IS TRUE. I HAVE INITIALED ALL CORRECTIONS AND HAVE INITIALED THE BOTTOM OF EACH PAGE CONTAINING THE STATEMENT. I HAVE MADE THIS STATEMENT FREELY WITHOUT HOPE OF BENEFIT OR REWARD, WITHOUT THREAT OF PUNISHMENT, AND WITHOUT COERCION, UNLAWFUL INFLUENCE, OR UNLAWFUL INDUCEMENT.

***E C Boston III***

\_\_\_\_\_  
(Signature of Person Making Statement)

WITNESSES:

Subscribed and sworn to before me, a person authorized by law to administer oaths this 27 day of Oct, 2000  
at Fort Wahoo

\_\_\_\_\_  
ORGANIZATION OR ADDRESS

***Stuart Denver***

\_\_\_\_\_  
(Signature of Person Administering Oath)

\_\_\_\_\_  
ORGANIZATION OR ADDRESS

\_\_\_\_\_  
(Typed Name of Person Administering Oath)

\_\_\_\_\_  
(Authority to Administer Oaths)

INITIALS OF PERSON MAKING STATEMENT

PAGE **6** OF **6** PAGES

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**DA FORM 2823 (FOR EDUCATIONAL USE ONLY-NOT EXACT DUPLICATE)**

## RIGHTS WARNING PROCEDURE/WAIVER CERTIFICATE

For use of this form, see AR 190-30; the proponent agency is ODCSOPS

### DATA REQUIRED BY THE PRIVACY ACT

**AUTHORITY:**

Title 10, United States Code, Section 3012(g)

**PRINCIPAL PURPOSE:**

To provide commanders and law enforcement officials with means by which information may be accurately identified.

**ROUTINE USES:**

Your Social Security Number is used as an additional/alternate means of identification to facilitate filing and retrieval.

**DISCLOSURE:**

Disclosure of your Social Security Number is voluntary.

1. LOCATION <b>Fort Wahoo VA</b>	2. DATE 27 Oct 00	3. TIME	4. FILE NO
5. NAME ( <i>Last, First, MI</i> ) <b>Boston, Edward C. III</b>	6. SSN 573-99-8877	7. GRADE/STATUS CPT	
8. ORGANIZATION OR ADDRESS G Co., 123d FSB			

### PART I - RIGHTS WAIVER/NON-WAIVER CERTIFICATE

**Section A. Rights**

The investigator whose name appears below told me that he/she is with the United States Army 21st Forward Support Battalion and wanted to question me about the following offense(s) of which I am suspected/accused: sexual harassment, maltreatment of subordinate. Before he/she asked me any questions about the offense(s), however, he/she made it clear to me that I have the following rights

- I do not have to answer any questions or say anything.
- Anything I say or do can be used as evidence against me in a criminal trial.
- (For personnel subject to the UCMJ) I have the right to talk privately to a lawyer before, during, and after questioning and to have a lawyer present with me during questioning. This lawyer can be a civilian lawyer I arrange for at no expense to the Government or a military lawyer detailed for me at no expense to me or both.

- or -

(For civilians not subject to the UCMJ) I have the right to talk privately to a lawyer before, during and after questioning and to have a lawyer present with me during questioning. I understand that this lawyer can be one that I arrange for at my own expense, or if I cannot afford a lawyer and want one, a lawyer will be appointed for me before any questioning begins.

- If I am now willing to discuss the offense(s) under investigation, with or without a lawyer present, I have a right to stop answering questions at any time, or speak privately with a lawyer before answering further, even if I sign the waiver below.

5. COMMENTS (*Continue on reverse side*)

**Section B. Waiver**

I understand my rights as stated above. I am willing to discuss the offense(s) under investigation and make a statement without talking to a lawyer first and without having a lawyer present with me.

WITNESSES (*if available*)

1a. NAME ( <i>Type or print</i> )	3. SIGNATURE OF INTERVIEWEE <b>EC Boston III</b>
b. ORGANIZATION OR ADDRESS AND PHONE	4. SIGNATURE OF INVESTIGATOR <b>Stuart Denver</b>
2a. NAME ( <i>Type or Print</i> )	5. TYPED NAME OF INVESTIGATOR Stuart Denver
b. ORGANIZATION OR ADDRESS AND PHONE	6. ORGANIZATION OF INVESTIGATOR HQ Co., 21st FSB, Fort Wahoo, VA

**Section C. Non-waiver**

- I do not want to give up my rights:  
☐ I want a lawyer ☐ I do not want to be questioned or say anything

2. SIGNATURE OF INTERVIEWEE

ATTACH THIS WAIVER CERTIFICATE TO ANY SWORN STATEMENT (*DA FORM 2823*) SUBSEQUENTLY EXECUTED BY THE SUSPECT/ACCUSED

**DA FORM 3881 (FOR EDUCATIONAL PURPOSES ONLY - NOT AN EXACT DUPLICATE)**

## PART II - RIGHTS WARNING PROCEDURE

### THE WARNING

- |   |  |
|---|--|
| <p>1. <b>WARNING</b> - Inform the suspect/accused of:</p> <ul style="list-style-type: none"><li>a. Your official position.</li><li>b. Nature of the offense(s).</li><li>c. The fact that he/she is a suspect/accused.</li></ul> <p>2. <b>RIGHTS</b> - Advise the suspect/accused of his/her rights as follows:</p> <p>“Before I ask you any questions, you must understand your rights.”</p> <ul style="list-style-type: none"><li>a. “You do not have to answer my questions or say anything.”</li><li>b. “Anything you say or do can be used as evidence against you in a criminal trial.”</li><li>c. (For personnel subject to the UCMJ) “You have the right to talk privately to a lawyer before, during, and after questioning and to have a lawyer present with you during questioning. This lawyer</li></ul> | <p>can be a civilian you arrange for at no expense to the Government or a military lawyer detailed for you at no expense to you, or both.”</p> <p style="text-align: center;">- or -</p> <p><i>(For civilians not subject to the UCMJ)</i> You have the right to talk privately to a lawyer before, during, and after questioning and to have a lawyer present with you during questioning. This lawyer can be one you arrange for at your own expense, or if you cannot afford a lawyer and want one, a lawyer will be appointed for you before any questioning begins.”</p> <ul style="list-style-type: none"><li>d. “If you are now willing to discuss the offense(s) under investigation, with or without a lawyer present, you have a right to stop answering questions at any time, or speak privately with a lawyer before answering further, even if you sign a waiver certificate.”</li></ul> <p>Make certain the suspect/accused fully understands his/her rights.</p> |
|---|--|

### THE WAIVER

- |  |  |
|--|--|
| <p>“Do you understand your rights?”</p> <p>(If the suspect/accused says “no,” determine what is not understood, and if necessary repeat the appropriate rights advisement. If the suspect/accused says “yes,” ask the following question.)</p> <p>“Have you ever requested a lawyer after being read your rights?”</p> <p>(If the suspect/accused says “yes,” find out when and where. If the request was recent (<i>i.e., fewer than 30 days ago</i>), obtain legal advice on whether to continue the interrogation. If the suspect/accused says “no,” or if the prior request was not recent, ask him/her the following question.)</p> | <p>“Do you want a lawyer at this time?”</p> <p>(If the suspect/accused says “yes,” stop the questioning until he/she has a lawyer. If the suspect/accused says “no,” ask him/her the following question.)</p> <p>“At this time, are you willing to discuss the offense(s) under investigation and make a statement without talking to a lawyer and without having a lawyer present with you?” <i>(If the suspect/accused says “no,” stop the interview and have him/her read and sign the non-waiver section of the waiver certificate on the other side of this form. If the suspect/accused says “yes,” have him/her read and sign the waiver section of the waiver certificate on the other side of this form.)</i></p> |
|--|--|

### SPECIAL INSTRUCTIONS

- |  |   |
|--|---|
| <p><b>WHEN SUSPECT/ACCUSED REFUSES TO SIGN WAIVER CERTIFICATE:</b> If the suspect/accused orally waives his/her rights but refuses to sign the waiver certificate, you may proceed with the questioning. Make notations on the waiver certificate to the effect that he/she has stated that he/she understands his/her rights, does not want a lawyer, wants to discuss the offense(s) under investigation, and refuses to sign the waiver certificate.</p> <p><b>IF WAIVER CERTIFICATE CANNOT BE COMPLETED IMMEDIATELY:</b> In all cases the waiver certificate must be completed as soon as possible. Every effort should be made to complete the waiver certificate before any questioning begins. If the waiver certificate cannot be completed at once, as in the case of street interrogation, completion may be temporarily postponed. Notes should be kept on the circumstances.</p> <p><b>PRIOR INCRIMINATING STATEMENTS:</b></p> <ul style="list-style-type: none"><li>1. If the suspect/accused has made spontaneous incriminating statements before being properly advised of his/her rights he/she should be told that such statements do not obligate him/her to answer further questions.</li></ul> | <p>2. If the suspect/accused was questioned as such either without being advised of his/her rights or some question exists as to the propriety of the first statement, the accused must be so advised. The office of the serving Staff Judge Advocate should be contacted for assistance in drafting the proper rights advisal.</p> <p><b>NOTE:</b> If 1 or 2 applies, the fact that the suspect/accused was advised accordingly should be noted in the comment section of the waiver certificate and initialed by the suspect/accused.</p> <p><b>WHEN SUSPECT/ACCUSED DISPLAYS INDECISION ON EXERCISING HIS/HER RIGHTS DURING THE INTERROGATION PROCESS.</b> If during the interrogation, the suspect displays indecision about requesting counsel (for example, “Maybe I should get a lawyer.”), further questioning must cease immediately. At that point, you may question the suspect/accused only concerning whether he or she desires to waive counsel. The questioning may not be utilized to discourage a suspect/accused from exercising his/her rights. (For example, do not make such comments as “If you didn’t do anything wrong, you shouldn’t need an attorney.”)</p> |
|--|---|

COMMENTS (*Continued*)

**REVERSE OF DA FORM 3881 (EDUCATIONAL PURPOSES ONLY-NOT EXACT DUPLICATE)**



## CHAPTER Y

JAGS-ADA (351)

3 January 2002

MEMORANDUM FOR Judge Advocate Officer Basic Course Students

SUBJECT: **Graded** Report of Survey Practical Exercise

1. Judge Advocates review reports of survey for legal sufficiency, advise investigating officers who conduct reports of survey, and advise clients facing financial liability based on reports of survey. Your mission is to write a legal sufficiency memorandum in proper military format IAW AR 25-50. I will post the due date and grading criteria separately.
2. Background. You just arrived at Fort Blank, Virginia, and the Staff Judge Advocate assigned you to the Administrative Law Division. Your boss, Major O. Bob Grastefon, summons you again to his office. Realizing that he forgot to discuss office procedures the last time he called you in, he starts by explaining the Administrative Law Division's role in the report of survey system. Once again, he digresses into a story about how he tried to repair the steering column on his 1981 Chevy Suburban but ended up paying the dealer to fix the additional damage caused by his mechanical mishap. Before he could return to the report of survey system, Lieutenant Colonel L. Diablo interrupted the meeting with a question about dove hunting with baited fields. Major O. Bob Grastefon dismissed you and gave you the enclosed report of survey on your way out.
3. Assignment. Conduct a legal review of the packet. You must raise issues, apply the law, and communicate your analysis and conclusions on legal sufficiency in a military memorandum addressed to the requester. Your memorandum will comply with AR 25-50. After you turn in the exercise, we will discuss the problem and proposed solutions in class. Keep a copy of your submission and bring it to class.
4. Research Library. Your research library is AR 735-5, DA PAM 735-5, and AR 25-50— all contained on your CD-ROM.
5. **This practical exercise is an individual graded exercise and may form the basis of comment in your Academic Evaluation Report (AER). You will not collaborate with fellow students. Address any questions regarding the assignment to your faculty advisor or me.**

Encl  
as

EVAN M. STONE  
MAJ, JA  
Professor, Administrative and  
Civil Law Department





ABCD-SUPT (735-5r)

3 November 200X

MEMORANDUM FOR Staff Judge Advocate, ATTN: Administrative Law, Fort Blank,  
Virginia 22222

SUBJECT: Report of Survey 0X-42

1. Request legal review of the subject report of survey.
2. POC for this request is CPT Smith, 8th Support Battalion S-4.

FOR THE COMMANDER:

Encl

DAVID R. DENT  
CPT, QM  
Adjutant

10 October 200X

MEMORANDUM FOR SFC Jean Getty, 456-98-0976, B Co, 108th Signal Company, Fort Blank, Virginia 22222

SUBJECT: Duty Appointment for Report of Survey No. 0X-42

1. You are appointed as a Report of Survey Investigating Officer effective 10 October 200X to investigate the subject Report of Survey.
2. Authority: AR 735-5.
3. Purpose: To perform a survey investigation IAW AR 735-5. You will obtain the details pertaining to the missing radio reported in Report of Survey No. 0X-42.
4. Your primary duty is to conduct this investigation and submit it to the appointing authority. You will support your findings with sufficient evidence. You will base your recommendations on your findings. You will submit your report of investigation to this headquarters no later than 10 November 200X.

FOR THE COMMANDER:

JAMES F. BOND  
MAJ, OD  
Adjutant

<b>DEPARTMENT OF THE ARMY</b> <b>REPORT OF SURVEY</b> For use of this form, see AR 735-5; the proponent agency is ODCSLOG		1. DATE PREPARED 0X0930	2. SURVEY NUMBER 0X-42	
3. TYPE OF PROPERTY Installation Property		4. ADDRESS OF ACCOUNTABLE OFFICER 108th Signal Company, Fort Blank, VA 22222		
5. ORIGINATOR (Accountable officer, or primary hand receipt holder) Henry T. Lawes, CPT, SC, Commanding				
6. NATIONAL STOCK NUMBER	7. ITEM DESCRIPTION	8. QTY	9. UNIT PRICE	10. TOTAL COST
5820-02-T33-6832	RADIO MOBILE MOTOROLA MPD 16 SN# 818213	1	1,700.00	1,700.00
11. DATE AND CIRCUMSTANCES On 20 August 200X, the monthly arms room inventory was conducted by CPT Foufax, Sandy L. After inventorying radios, it was discovered that the radio with serial number 818213 was not in the arms room nor signed out for the day. There was no record of the radio being turned into the shop for repair. At that time, SPC Adams, Jane A., notified me and called hand receipt holders that are signed for radios to check to see if one of their personnel had swapped out a radio because there was a radio in the arms room at the time of the inventory that was not assigned to the arms room. On 30 August 200X, I directed an inventory of radios in the arms room and discovered that serial number 818213 was still missing. I then went through the daily sign out sheets (Form 1-2) for the month of August 200X to see when the radio was last accounted for. I discovered that on 15 August 200X PV2 McClean, 30th Signal Detachment, had signed for the radio and had not signed it back into the arms room. The 30th Signal Detachment was then notified of the situation and they in turn notified PV2 McClean's Platoon Sergeant, SFC Quick. I also talked with SSG Reynolds and LT Dane. As of 19 September 200X, SFC Quick and PV2 McClean had not been able to locate the radio.				
12. AFFIDAVIT  I do solemnly swear (or affirm) that (to the best of my knowledge and belief) the articles of public property shown above and/or on attached sheets were lost, destroyed, damaged, or worn out in the manner stated, while in the public service.		13. Subscribed and sworn to (or affirmed) before me at this day of NAME AND GRADE (type and sign) TYPED NAME, GRADE, AND SSN HENRY T. LAWES, CPT 801-32-1119		
14. DATE 0X1002	15. NAME, GRADE, AND SIGNATURE OF ACCOUNTABLE OFFICER FRANKLIN PIERCE, 1LT, SC Property Book Officer		16. DOCUMENT NUMBER AZ992	
17. APPOINTING AUTHORITY I have received the evidence pertaining to the lost, damaged, or destroyed property, and have determined that the following action is required. a. <input type="checkbox"/> No further investigation is required. There is no positive evidence of negligence. I do not suspect willful misconduct, or deliberate unauthorized use. I hereby forward this document to the approving authority for final action. (Proceed to block 37.) b. <input type="checkbox"/> The circumstances surrounding the lost, damaged or destruction warrants further investigation. (Proceed to block 21.) c. <input type="checkbox"/> Conduct an investigation according to AR 15-6. Attach this document, as an exhibit, to the investigation and forward it to the approving authority.				
18. DATE	19. TYPED NAME, GRADE, AND TITLE OF APPOINTING AUTHORITY		20. SIGNATURE	

21. APPOINTING AUTHORITY HQ, 8th Support Battalion		22. STATION FORT BLANK, VA 22222		23. DATE 0X1012	
24. NAME, GRADE OF SURVEYING OFFICER GETTY, JEAN D., E-7					
25. YOU ARE APPOINTED SURVEYING OFFICER BY ORDER OF: <u>WILLIAM BALDWIN, LTC, OD, Commanding</u> <i>(Typed name, grade of Appointing Authority)</i>					
26. FINDINGS AND RECOMMENDATION					
<p>I have examined all available evidence as shown in exhibits <u>A</u> to <u>E</u>, and as indicated below have personally investigated the same and it is my belief that the article(s) listed hereon and/or attached to sheets, total cost \$ <u>1,700.00</u></p> <p>was lost as a result of negligence by PV2 McClean, 801-23-1345, 30th Signal Detachment, Fort Blank, VA 22222.</p> <p>Findings: That prior to 15 August 200X, a Mobile Motorola MPD 16 radio serial number 818213 was accounted for on Form 1-2. This form shows that the radio had been signed in and out of the arms room. On 15 August 200X at 1330, PV2 McClean of the 30th Signal Detachment signed out radio number 16 serial number 818213 and never signed the radio back into the arms room on Form 1-2. Upon completion of researching all Forms 1-2 after 15 August 200X to the present, I discovered that radio number 818213 was no longer accounted for nor was the radio signed out to anyone. There is no clear control of the radios being issued by the armorers in the arms room. During my checks of the radios in the arms room, three additional radios were believed to be missing. Further checking with the radio shop in Fort Lee, VA, revealed that there were two radios that were not signed for properly on hand receipts. The armorers continued to count 52 radios thru 20 August 200X when CPT Foufax conducted a 100% inventory where it was discovered that radio number 818213 was missing from the arms room. The radio was five years old.</p> <p>Recommendation: That PV2 McClean be held pecuniarily liable in the amount of \$1,275 for lost property. Recommend that 108th Signal Company have all nonessential radios returned back to unit support room and conduct a 100% visual and serial number radio inventory. Further recommend that all armorers be properly trained on the correct procedures on filling out Form 1-2 and conducting daily inventories at the end of each shift.</p> <p>PV2 McClean's monthly base pay at time of the loss was \$913.20. Total price: \$1,700 - (25% depreciation) \$425 = \$1,275.</p>					
27. RECOMMEND PECUNIARY CHARGE		a. ACTUAL LOSS \$1,700.00	b. AMOUNT CHARGED \$1,275.00	c. LOSS TO GOVERNMENT \$425.00	
28. DATE 0X1109	29a. TYPED NAME, GRADE OF SURVEYING OFFICER GETTY, JEAN, E-7		b. SIGNATURE		
30. I have examined the findings and recommendations of the Surveying Officer on this report of survey and the exhibits <u>A</u> to <u>E</u> and <input checked="" type="checkbox"/> desire to make a statement which is attached hereto; <input type="checkbox"/> do not desire to make a statement. I am aware of my right to legal advice in preparing the statement and, if a pecuniary charge is finally approved, to make appeal and <i>(If an enlisted man)</i> my right to request remission of indebtedness. I am/am not the accountable officer for the lost or damaged property. The property was/was not my personal arms or equipment.					
31. DATE 0X1109	32a. TYPED NAME, GRADE OF INDIVIDUAL BEING CHARGED MCCLEAN, MILDRED D.		b. SIGNATURE		
33. RECOMMENDATION BY THE APPOINTING AUTHORITY <input type="checkbox"/> CONCUR <input type="checkbox"/> NONCONCUR		34. COMMENTS			
35. DATE	36a. TYPED NAME, GRADE & TITLE OF APPOINTING AUTH		b. SIGNATURE		
37. APPROVING AUTHORITY a. <input type="checkbox"/> REJECTED. Investigation is required. Appoint a survey officer. Date _____ Initials _____ b. <input type="checkbox"/> REJECTED. Investigation incomplete. Additional information required. Date _____ Initials _____ c. <input type="checkbox"/> APPROVED BY AUTHORITY OF THE SECRETARY OF THE ARMY.				38. PECUNIARY CHARGE	
				a. ACTUAL LOSS	
				b. AMOUNT CHARGED	
				c. LOSS TO GOVERNMENT	
39. DATE	40a. TYPED NAME, GRADE & TITLE OF APPROVING AUTH WILLIAM BALDWIN, LTC, OD Commanding		b. SIGNATURE		

REVERSE, DA FORM 4697, SEP 81

USAPPC V3.00



<b>SWORN STATEMENT</b> <small>For use of this form, see AR 190-45; the proponent agency is ODCSOPS</small>			
<b>LOCATION</b> BLDG 10, FORT BLANK, VA 22222	<b>DATE</b> 0X1020	<b>TIME</b> 0945	<b>FILE NUMBER</b>
<b>LAST NAME, FIRST NAME, MIDDLE NAME</b> JONES, JOHN PAUL	<b>SOCIAL SECURITY NUMBER</b> 821-19-2131		<b>GRADE/STATUS</b> PFC
<b>ORGANIZATION OR ADDRESS</b> 108th Signal Company, Fort Blank, VA 22222			
<p>I, <u>JOHN P. JONES</u>, WANT TO MAKE THE FOLLOWING STATEMENT UNDER OATH:</p> <p>THAT ON THE 15TH OF AUGUST 200X ISSUED RADIO #818213 TO PFC MCCLEAN AND SHE NEVER RETURNED IT ON MY SHIFT.</p> <p>Q: DID YOU EVER RECEIVE A RADIO CARD FROM MCCLEAN?</p> <p>A: I CAN'T REMEMBER THAT FAR BACK ABOUT A RADIO CARD.</p> <p>Q: WHERE DO YOU KEEP RADIO CARDS WHEN ISSUING RADIOS OUT TO SOLDIERS?</p> <p>A: WE KEEP THEM ALONG WITH THE WEAPON CARDS IN THE EMPTY WEAPONS SLOT.</p> <p>Q: HOW OFTEN DO SOLDIERS SIGN OUT RADIOS WITHOUT A RADIO CARD?</p> <p>A: USUALLY EVERYDAY SOLDIERS FORGET TO BRING RADIO CARDS SO WE HAND RECEIPT THEM A RADIO.</p> <p>END OF STATEMENT</p>			
<b>EXHIBIT</b> A	<b>INITIALS OF PERSON MAKING STATEMENT</b>		<b>PAGE 1 OF</b> <u>1</u> <b>PAGES</b>
<small>ADDITIONAL PAGES MUST CONTAIN THE HEADING "STATEMENT OF ____ TAKEN AT ____ DATED ____ CONTINUED." THE BOTTOM OF EACH ADDITIONAL PAGE MUST BEAR THE INITIALS OF THE PERSON MAKING THE STATEMENT AND BE INITIALED AS "PAGE ____ OF ____ PAGES." WHEN ADDITIONAL PAGES ARE UTILIZED, THE BACK OF PAGE 1 WILL BE LINED OUT, AND THE STATEMENT WILL BE CONCLUDED ON THE REVERSE SIDE OF ANOTHER COPY OF THIS FORM.</small>			

STATEMENT (Continued)  
NOTHING FOLLOWS

**AFFIDAVIT**

I, JOHN P. JONES, HAVE READ OR HAVE HAD READ TO ME THIS STATEMENT WHICH BEGINS ON PAGE 1 AND ENDS ON PAGE 1. I FULLY UNDERSTAND THE CONTENTS OF THE ENTIRE STATEMENT MADE BY ME. THE STATEMENT IS TRUE. I HAVE INITIALED ALL CORRECTIONS AND HAVE INITIALED THE BOTTOM OF EACH PAGE CONTAINING THE STATEMENT. I HAVE MADE THIS STATEMENT FREELY WITHOUT HOPE OF BENEFIT OR REWARD, WITHOUT THREAT OF PUNISHMENT, AND WITHOUT COERCION, UNLAWFUL INFLUENCE, OR UNLAWFUL INDUCEMENT.

\_\_\_\_\_  
(Signature of Person Making Statement)

WITNESSES:

Subscribed and sworn to before me, a person authorized by law to administer oaths, this 20th day of October, ~~19~~200X at \_\_\_\_\_

\_\_\_\_\_  
ORGANIZATION OR ADDRESS

\_\_\_\_\_  
(Signature of Person Administering Oath)

JEAN GETTY, SFC

\_\_\_\_\_  
(Typed Name of Person Administering Oath)

\_\_\_\_\_  
ORGANIZATION OR ADDRESS

ART 136, UCMJ (b)(4)

\_\_\_\_\_  
(Authority To Administer Oaths)

INITIALS OF PERSON MAKING STATEMENT

PAGE 1 OF 1 PAGES

<b>SWORN STATEMENT</b> <small>For use of this form, see AR 190-45; the proponent agency is ODCSOPS</small>			
<b>LOCATION</b> BLDG 10, FORT BLANK, VA 22222	<b>DATE</b> 0X1020	<b>TIME</b> 0930	<b>FILE NUMBER</b>
<b>LAST NAME, FIRST NAME, MIDDLE NAME</b> ADAMS, JANE A.	<b>SOCIAL SECURITY NUMBER</b> 506-35-1982		<b>GRADE/STATUS</b> SPC/E-4
<b>ORGANIZATION OR ADDRESS</b> 108th Signal Company, Fort Blank, VA 22222			
<p>I, <u>JANE A. ADAMS</u>, WANT TO MAKE THE FOLLOWING STATEMENT UNDER OATH:</p> <p>On 20 Aug 0X, CPT Foufax conducted the monthly inventory of the arms room. After completing the inventory, it was noted that one (1) radio serial number 818213 was not accounted for. It was neither physically present nor was there any documentation of the radio being turned into maintenance for repair. At that time, I notified CPT Lawes of the missing radio and contacted hand receipt holders to see if one of their soldiers had possibly swapped out one of their inoperable radios for one assigned to the arms room. Then on 30 Aug 0X, I went to the arms room to inventory radios and discovered that radio 818213 was still not accounted for. I then gave all the Forms 1-2 for the month of August to CPT Lawes. He and I went through all of them to see when the radio was last accounted for. That's when it was discovered that on 15 Aug 0X PV2 McClean of 30th Signal Detachment was the last to sign for the radio and had not signed it back in. There was another radio not accounted for at the time of the inventory, but it was found to be in the possession of the Signal Detachment and was recovered later that same day (20 Aug) and returned to the arms room.</p> <p>The reason for the time lapse (20 Aug - 19 Sep) before initiating a report of survey is because I wanted to give PV2 McClean time to try and locate the aforementioned missing radio.</p> <p>Q: Why are they maintained in weapons rack?            A: Because when an individual signs out his/her weapon, radio cards are put in the rack along with the individual's weapons card.</p> <p>Q: If an individual does not have a radio card, can he/she sign out a radio?            A: Yes, but by using a hand receipt and signing the Form 1-2.</p> <p>END OF STATEMENT</p>			
<b>EXHIBIT</b> b	<b>INITIALS OF PERSON MAKING STATEMENT</b>		<b>PAGE 1 OF <u>1</u> PAGES</b>
<small>           ADDITIONAL PAGES MUST CONTAIN THE HEADING "STATEMENT OF ____ TAKEN AT ____ DATED ____ CONTINUED."            THE BOTTOM OF EACH ADDITIONAL PAGE MUST BEAR THE INITIALS OF THE PERSON MAKING THE STATEMENT AND BE INITIALED AS "PAGE ____ OF ____ PAGES." WHEN ADDITIONAL PAGES ARE UTILIZED, THE BACK OF PAGE 1 WILL BE LINED OUT, AND THE STATEMENT WILL BE CONCLUDED ON THE REVERSE SIDE OF ANOTHER COPY OF THIS FORM.         </small>			

STATEMENT (Continued)  
NOTHING FOLLOWS

AFFIDAVIT

I, JANE A. ADAMS, HAVE READ OR HAVE HAD READ TO ME THIS STATEMENT WHICH BEGINS ON PAGE 1 AND ENDS ON PAGE 1. I FULLY UNDERSTAND THE CONTENTS OF THE ENTIRE STATEMENT MADE BY ME. THE STATEMENT IS TRUE. I HAVE INITIALED ALL CORRECTIONS AND HAVE INITIALED THE BOTTOM OF EACH PAGE CONTAINING THE STATEMENT. I HAVE MADE THIS STATEMENT FREELY WITHOUT HOPE OF BENEFIT OR REWARD, WITHOUT THREAT OF PUNISHMENT, AND WITHOUT COERCION, UNLAWFUL INFLUENCE, OR UNLAWFUL INDUCEMENT.

\_\_\_\_\_  
(Signature of Person Making Statement)

WITNESSES:

Subscribed and sworn to before me, a person authorized by law to administer oaths, this 20th day of October, ~~xx~~<sup>200X</sup> at Fort Blank, VA 22222

\_\_\_\_\_  
ORGANIZATION OR ADDRESS

\_\_\_\_\_  
(Signature of Person Administering Oath)

JEAN GETTY, SFC

\_\_\_\_\_  
(Typed Name of Person Administering Oath)

\_\_\_\_\_  
ORGANIZATION OR ADDRESS

ART 136, UCMJ (b)(40)

\_\_\_\_\_  
(Authority To Administer Oaths)

INITIALS OF PERSON MAKING STATEMENT

PAGE 1 OF 1 PAGES

USAPPC V2.00



<b>SWORN STATEMENT</b> <small>For use of this form, see AR 190-45; the proponent agency is ODCSOPS</small>			
<b>LOCATION</b> BLDG 10, FORT BLANK, VA 22222	<b>DATE</b> 0X1102	<b>TIME</b> 1415	<b>FILE NUMBER</b>
<b>LAST NAME, FIRST NAME, MIDDLE NAME</b> McCLEAN, MILDRED D.	<b>SOCIAL SECURITY NUMBER</b> 801-23-1345		<b>GRADE/STATUS</b> E-2
<b>ORGANIZATION OR ADDRESS</b> 30th Signal Detachment, Fort Blank, VA 22222			
<p>I, <u>MILDRED D. McCLEAN</u>, WANT TO MAKE THE FOLLOWING STATEMENT UNDER OATH:</p> <p>On 15 August 200X, during completion of my duty on the road, I had returned to the arms room to turn in my equipment. Upon turning in my equipment, I had not signed my name to the roster for turning in radio #818213. But I had received my radio card back and have since been using the same radio card. I have been later told that the same GE radio was lost, found again, then never found and still lost. That's all I know.</p> <p>END OF STATEMENT</p>			
<b>EXHIBIT</b> C	<b>INITIALS OF PERSON MAKING STATEMENT</b>		<b>PAGE 1 OF</b> <u>1</u> <b>PAGES</b>
<small>ADDITIONAL PAGES MUST CONTAIN THE HEADING "STATEMENT OF ____ TAKEN AT ____ DATED ____ CONTINUED." THE BOTTOM OF EACH ADDITIONAL PAGE MUST BEAR THE INITIALS OF THE PERSON MAKING THE STATEMENT AND BE INITIALED AS "PAGE ____ OF ____ PAGES." WHEN ADDITIONAL PAGES ARE UTILIZED, THE BACK OF PAGE 1 WILL BE LINED OUT, AND THE STATEMENT WILL BE CONCLUDED ON THE REVERSE SIDE OF ANOTHER COPY OF THIS FORM.</small>			

STATEMENT (Continued)  
NOTHING FOLLOWS

AFFIDAVIT

I, MILDRED D. McCLEAN, HAVE READ OR HAVE HAD READ TO ME THIS STATEMENT WHICH BEGINS ON PAGE 1 AND ENDS ON PAGE 1. I FULLY UNDERSTAND THE CONTENTS OF THE ENTIRE STATEMENT MADE BY ME. THE STATEMENT IS TRUE. I HAVE INITIALED ALL CORRECTIONS AND HAVE INITIALED THE BOTTOM OF EACH PAGE CONTAINING THE STATEMENT. I HAVE MADE THIS STATEMENT FREELY WITHOUT HOPE OF BENEFIT OR REWARD, WITHOUT THREAT OF PUNISHMENT, AND WITHOUT COERCION, UNLAWFUL INFLUENCE, OR UNLAWFUL INDUCEMENT.

\_\_\_\_\_  
(Signature of Person Making Statement)

WITNESSES:

Subscribed and sworn to before me, a person authorized by law to administer oaths, this 2d day of November, ~~xx~~200X at \_\_\_\_\_

\_\_\_\_\_  
ORGANIZATION OR ADDRESS

\_\_\_\_\_  
(Signature of Person Administering Oath)

JEAN GETTY, SFC

\_\_\_\_\_  
(Typed Name of Person Administering Oath)

\_\_\_\_\_  
ORGANIZATION OR ADDRESS

ART 136, UCMJ (b)(4)

\_\_\_\_\_  
(Authority To Administer Oaths)

INITIALS OF PERSON MAKING STATEMENT

PAGE 1 OF 1 PAGES

WEAPONS, AMMUNITION AND RADIO REGISTER						ORGANIZATION: 108 <sup>th</sup> Signal Company			
TYP E	SERIAL #	IN AMMO OUT		IN TIME/DATE OUT		ISSUED TO (SIGNATURE & SSN)	ISSUO R	TURN-IN BY (SIGNATUR E)	CHECKED IN (SIGNATUR E)
GE	809200			1130 0X0815	0500 0X0815		JPJ		
GE	705002			1125 0X0815	0515 0X0815		JPJ		
GE	702159			1115 0X0815	0516 0X0815		JPJ		
GE	818213				0520 9X0815		JPJ		
GE	912221			1140 0X0815	0525 0X0815		JPJ		
GE	777903			1132 0X0815	0530 0X0815		JPJ		
GE	508889			1845 0X0815	1302 0X0815		JPJ		

GE	885222			1850 0X0815	1310 00815		JPJ		
GE									

FORM 1-2 (Fort Blank Local)

# ADMINISTRATIVE AND CIVIL LAW DEPARTMENT

## ***BASIC COURSE DESKBOOK***



### **Part V** **Reference**

The Judge Advocate General's School  
United States Army

March 2002

JA 280

## **ADMINISTRATIVE LAW TOPIC/REFERENCE INDEX\***

### **AAFES**

Board of Directors AR 15-110 (24 Feb 95)  
General Policies AR 60-10 (17 Jun 88) (jt pub)  
Operating Policies AR 60-20 (15 Dec 92) (jt pub)  
Equipment and Facilities AR 60-31 (26 Apr 74) (jt pub)  
Investigative Spt AR 195-7 (11 Mar 85)  
Personnel Policies AR 60-21 (1 Aug 79) (jt pub)  
Sale or Rental of Sexually Explicit Material DODI 4105.70 (29 Jun 98)

ABANDONED PROPERTY 10 U.S.C. 2575; DODD 4160.21M

ABBREVIATIONS AND BREVITY CODES AR 310-50 (15 Nov 85)

ABCMR - See ARMY BOARD FOR THE CORRECTION OF MILITARY RECORDS

### **ABSENCES, MILITARY PERSONNEL**

AWOL AR 630-10 (in All Ranks Personnel Update) (10 Jun 92); DODD 1325.2 (20 Aug 79)  
Absentee Deserter Program and Surrender AR 190-9 (24 Jul 92)  
Leaves and Passes AR 600-8-10 (1 Jul 94)  
Dropping from the Rolls DODD 1332.16 (10 Mar 70)  
TDY Joint Travel Regulation  
To Attend Private Organization Meetings AR 1-211 (1 Dec 83)

ACADEMIC EVALUATION REPORTS AR 623-1 (Evaluations UPDATE) (31 Mar 92)

ACADEMIC RELIEF AR 351-1

### **ACCIDENT REPORTING AND RECORDS AR 385-40 (1 Nov 94)**

Aircraft AR 40-21 (23 Nov 76)  
Explosives AR 385-14 (8 Apr 91)  
Motor Vehicles AR 385-55 (12 Mar 87)  
Release of Information AR 360-1 (15 Sep 00)  
Reporting and Records AR 385-40 (1 Jan 94), DA PAM 385-40 (1 Nov 94); DODI 6055.7 (3 Oct 00)

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*\*Dates cited reflect changes incorporated into USAPA version of the reference and not necessarily the effective date of the publication.*

ACCOUNTING (see FINANCE ADMINISTRATION and FUNDS below)

ARMY CONTINUING EDUCATION SYSTEM AR 621-5 (17 Nov 93)

ACQUISITION AND STORAGE OF INFORMATION CONCERNING NON-AFFILIATES  
PERSONS AND ORGANIZATIONS AR 380-13 (13 Sep 74)

ACRONYMS AR 310-50 (15 Nov 85)

ADMINISTRATIVE SEPARATIONS AR 635-200 (1 Jan 01)  
(see MILITARY PERSONNEL below)

ADOPTION AR 608-12 (2 May 94); DODI 1341.9 (29 Jul 93)

ADRB (see ARMY DISCHARGE REVIEW BOARD)

ADVANCE RETURN OF CIVILIAN EMPLOYEES AND FAMILY MEMBERS AR 55-46  
(20 Jun 94); JTR Vol 2

ADVERTISING (see COMMERCIAL ACTIVITIES )  
MWR ADVERTISING AR 215-1 (25 Oct 98)

AER (see ARMY EMERGENCY RELIEF )

AFDCB AR 190-24 (30 Jun 93)

AFFIRMATIVE ACTION AR 690-12 (4 Mar 88), DA PAM 600-26 (23 May 90)

AIDS AR 600-110 (1 Jun 96)

AIR CONTROL (TACTICAL) AR 525-25 (6 Jun 86)

AIR TRANSPORTATION (MAC) AR-59 series; DOD 4515.13R (Nov 94)  
Operational Support Airlift DODD 4500.43 (28 Oct 96)  
Use of Government Aircraft and Air Travel DODD 4500.56 (2 Mar 97)

AIRCRAFT (see also AVIATION )  
Accidents AR 40-21 (23 Nov 76)  
Investigations AR 95-30 (26 Apr 76); DA PAM 385-40 (1 Nov 94)  
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NAFI Administration---AR 215-1 (25 Oct 98)

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## APPREHENSION

and Confinements AR 633-30 (28 Feb 89), Change 5 (28 Mar 89)

and Restraint and Release to Civil Authorities AR 600-40 (28 Nov 77), para. 1,2,3,4, and 6 are superceded by AR 630-10 (10 Jul 92)

ARMED FORCES DISCIPLINARY CONTROL BOARD AR 190-24 (30 Jun 93)(jt pub)

ARMED FORCES RADIO AND TELEVISION SERVICES AR 360-7

ARMS (see FIREARMS below)

ARMS EXPORT CONTROL ACT 22 USC 2770a

ARMY BOARD FOR CORRECTION OF MILITARY RECORDS AR 15-185 (29 Feb 00); 10 U.S.C. sec 1552.

ARMY BROADCASTING SERVICE AR 360-1 (15 Sep 00)

ARMY COMMAND POLICY AR 600-20 (15 Jul 99)

ARMY COMMUNITY SERVICE PROGRAM AR 608-1 (31 Aug 00)

ARMY CONTINUING EDUCATION SYSTEM AR 621-5 (17 Nov 93)

ARMY DISCHARGE REVIEW BOARD AR 15-180 (15 Oct 84); 10 U.S.C. sec 1553; DODD 1332.28 (11 Aug 82)

ARMY EMERGENCY RELIEF AR 930-4 (30 Aug 94)

To Civilian Law Enforcement Officials AR 500-51 (1 Jul 83)

ARMY GRADE DETERMINATION REVIEW BOARD AR 15-80 (28 Oct 86)

ARMY NATIONAL GUARD AR 130 and 135 series

ARMY RESERVES AR 135 and 140 series

ARMY HEALTH PROMOTION AR 600-63 (28 Apr 96)

ARMY SAFETY PROGRAM AR 385-10 (29 Feb 00)

ARMY TERRORISM COUNTERACTION PROGRAM AR 525-13 (10 Sep 98)

ART Army Art Collection AR 870-20 (11 Jan 99)

ARTICLE 15, UCMJ AR 27-10 (20 Aug 99)

ARTICLE 32 PROCEDURAL GUIDE FOR INVESTIGATING OFFICER DA PAM 27-17 (16 Sep 90)

ARTICLE 138 COMPLAINTS AR 27-10 (20 Aug 99)

ARTICLE 139 CLAIMS AR 27-20 (31 Dec 97); DA PAM 27-162 (1 Apr 98)



## ASSIGNMENTS

Overseas Service AR 614-30 (25 Sep 98)

Enlisted Assignments AR 614-200 (20 Nov 00)

Officer Assignment Policies AR 614-100 (20 Sep 90)

Assignment of Female Soldiers AR 600-13 (27 Mar 92)

ASSUMPTION OF COMMAND AR 600-20 (15 Jul 99)

ATTITUDE AND OPINION SURVEY PROGRAM AR 600-46 (1 Nov 78)

AUDITS AR 36-5 (16 Dec 91)

AUSA JER DOD 5500.7-R (30 Aug 93)

AUTHORITY, DELEGATION OF (see regulations concerning specific subject area for provisions concerning delegation of authority)

AUTHORITY LINES AR 340-15

AUTOMATION MANAGEMENT AR 25-1 (15 Feb 00)

AUTOMATION SECURITY AR 380-19 (27 Feb 98)

AUTOPSIES AR 40-2 (15 Mar 83); AR 600-8-1 (20 Oct 94)

## AVIATION

Air Transportation Eligibility AR 95-1 (1 Sep 97); AR 360-1 (15 Sep 00), DOD 4515.13-R (Nov 94)

Aviation Accident Collateral Investigations DA Pam 385-40 (1 Nov 94)

Aviation Accident Prevention AR 385-95 (10 Dec 99)

Flight Regulations AR 95-1 (1 Sep 97)

Flying Evaluation Boards AR 600-105 (15 Dec 94)

## AWARDS AND DECORATIONS

Civilian AR 672-20 (29 Jan 99)

NAFI Employees AR 215-3, Ch 9 (10 Sep 90) (in MWR Update)

Military AR 600-8-22 (25 Feb 95)

AWOL AR 630-10 (10 Jun 92) (in All Ranks Personnel Update); (see also ABSENCE, MILITARY PERSONNEL above)

Military Police Apprehension Program AR 190-9 (24 Jul 92) (see also MILITARY POLICE below)

BANDS AR 220-90 (27 Nov 00); AR 360-1 (15 Sep 00)

BANKRUPTCY PROCEEDINGS AR 37-103

## BANK AND BANKING ACTIVITIES

Banks and Credit Unions on DA Installations AR 210-135 (1 Jun 88); 32 CFR 231; DODD 1000.10 (26 Jul 89); DODD 1000.11 (9 Jun 00); DODD 1000.12 (26 Jul 89)

Obtaining Information From Financial Institutions DODD 5400.12 (6 Feb 80), AR 190-6 (15 Jan 82)

Right to Financial Privacy Act 12 USC 3401 et seq.; AR 190-6 (15 Jan 82)

## BARS TO REENLISTMENT AR 601-280 (31 Mar 99)

## BAR LETTERS AR 210-10

## BILLETING OPERATIONS AR 210-11 ; AR 405-80 (10 Oct 97)

## BLIND VENDORS AR 210-25 (1 Jan 79)

## BOARDS OF OFFICERS AR 15-6 (30 Sep 96)

## BORROWED MILITARY MANPOWER AR 570-4 (15 May 00)

## BOY SCOUTS DOD DIR 5500.7-R, JER (30 Aug 93)

Off-post AR 725-1 (25 Sep 89); AR 700-31; AR 360-1 (15 Sep 00)

On-post AR 405-80 (10 Oct 97)

## BUDGET

Budgeting, Funding, etc., for Base Operations Support AR 37-49 (15 Oct 78)

## BREATHALYZERS AR 190-5 (7 Aug 88)

## BUGS (see INSECT CONTROL below)

## BUILDINGS AND STRUCTURES AR 420-70 (10 Oct 97)

## BUS SERVICE (see MOTOR VEHICLES below)

## CAMOUFLAGE AR 525-21

## CASUALTY

Mortuary Affairs Policy DODD 1300.22 (3 Feb 00); DODI 1300.18 (27 Dec 91)

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## CHAPELS/CHAPLAINCY

General AR 165-1 (26 May 00)

## CHARITIES (see COMBINED FEDERAL CAMPAIGN below)

## CHECKS

Check Cashing Control and Abuse Prevention AR 210-60 (26 Aug 88); DA Pam 608-35-1

Dishonored Check Collection AR 210-60 (26 Aug 88); 37 USC 1007(c); DOD Pay and Entitlements Manual, paras 70701 and 70702 and Table 77-5; AR 37-104-3

CHEMICAL SURETY AR 50-6 (1 Feb 95)

CHILD ABUSE AR 608-18 (1 Sep 95); DODI 6400.2 (10 Jul 87)

CHILD CARE AR 608-10 (15 Aug 97)

#### CHILD CUSTODY

General AR 608-99 (1 Nov 94)

Parental Kidnapping DODD 5525.9 (27 Dec 88)

CHILD DEVELOPMENT SERVICES AR 608-10 (15 Aug 97)

CID INVESTIGATIONS AR 195-2 (30 Oct 85)(see also CRIMINAL INVESTIGATIONS below)

CITIZENSHIP AR 608-3; AR 608-99 (1 Nov 94)

CIVIL ASSISTANCE/HUMANITARIAN RELIEF DODD 2205.2 (6 Oct 94)

Civil Affairs DODD 2000.13 (27 Jun 94)

Excess Property 10 USC 2547

Medical Aid 10 USC 401

Refugees 8 USC 1521; DODD 2000.11 (3 Mar 72)

Shelter 10 USC 2546

Transportation of Relief Supplies 10 USC 402

CIVIL AUTHORITIES, RELEASE TO AR 600-40

CIVIL DISTURBANCES AR 500-50 (21 Apr 72); DODD 3025.12 (4 Feb 94); DODD 3025.15 (18 Feb 97)

Search and Rescue Operations AR 500-2 (15 Jan 80)

#### CIVILIAN MISCONDUCT

Acquisition and Storage of Information Concerning Non-Affiliated Persons and Organizations AR 380-13 (13 Sep 74)

CIVILIAN PERSONNEL AR 690 series

General Civilian Personnel Manual DOD 1400.25-M (25 Nov 96); see DOD 1400-1499 series

Awards (see AWARDS above)

Career Management AR 690-950 (8 Sep 88)

Contingency and Emergency Planning Guidelines DODI 1400.32 (24 Apr 95)

Discipline AR 690-700, Ch 751

Emergency Essential Civilians AR 690-11 (14 Sep 90); DOD 1404.10 (10 Apr 92); DODD 1400.31 (28 Apr 95); DODD 1400.32 (28 Apr 95)

Employment AR 690-300 (12 Aug 94)

Equal Employment Opportunity AR 690-600 (18 Sep 89)  
Civilian Employee Deployment Guide DA PAM 690-47 (1 Nov 95)  
Contractor Deployment Guide DA PAM 715-16 (27 Feb 98)  
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Air Force (210) 652-5774/5775/6377; DSN 487-5774

Army (Enlisted) (317) 542-4211/3647

Army (Officer) DSN 221-9240

Navy (703) 614-3155/5011; DSN 224-3155

USMC (703) 640-3942; DSN 224-2380

LOGISTICS AR 700 series

LOGISTIC SUPPORT OF U.S. NONGOVERNMENTAL, NONMILITARY AGENCIES, AND  
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Administrative and Logistical Support of Overseas Security Assistance Organizations  
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MAGISTRATES AR 190-29 (1 Mar 84)

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